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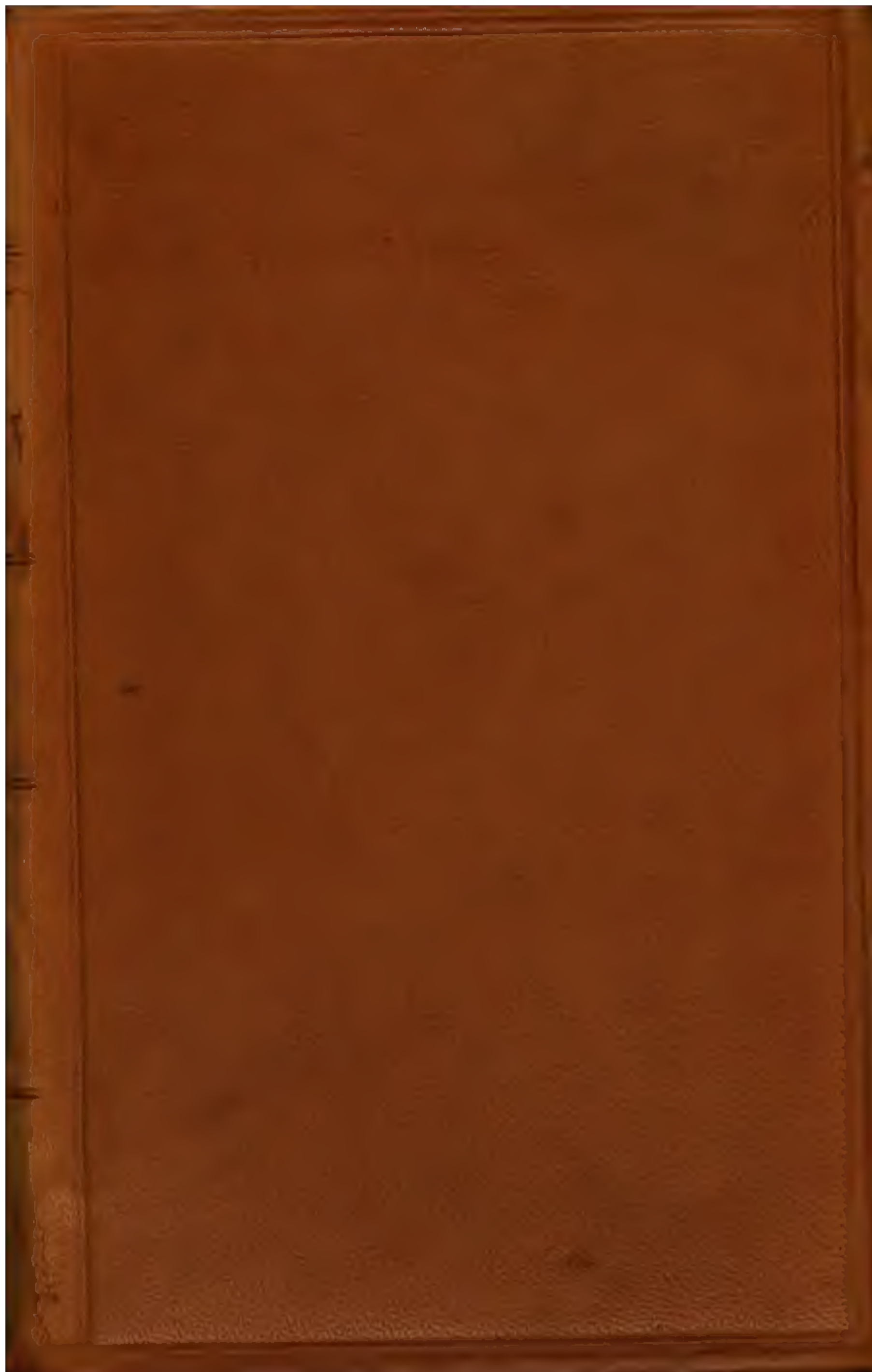
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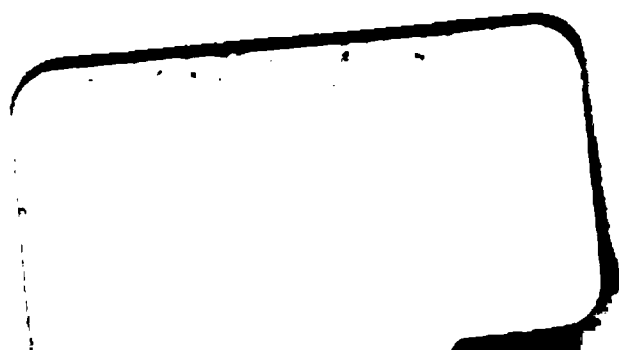
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# RAILROAD REPORTS

(Vol. 49 American and English  
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,  
DECIDED BY THE COURTS OF  
LAST RESORT

IN THE

UNITED STATES.

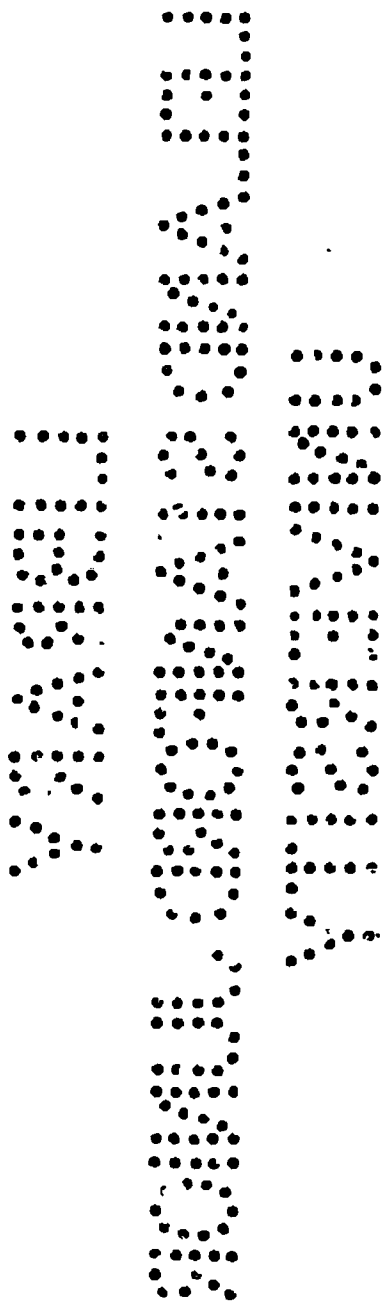
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# RAILROAD REPORTS

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RICH *v.* CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, November 12, 1906.)

[149 Fed. Rep. 79.]

**Railroads—Licensees—Death—Negligence—Evidence.\***—In an action for the death of a pedestrian while crossing defendant's railroad track, the engineer and fireman of the engine that struck deceased, and two others who stood near by, and in front of the engine, testified that the bell was constantly ringing as the engine was being backed toward the place of the accident. Held that evidence of witnesses, who were not paying attention to the engine at the time, and were not necessarily in a position to have heard any bell ring or whistle sound before the accident, that they heard neither bell nor whistle, was insufficient to constitute a substantial conflict and warrant a finding that defendant was negligent in failing to ring the bell or sound the whistle.

**Same—Signal Lights.**—Where a witness testified that when he came up to defendant's railroad track where decedent was hurt, he noticed there was no light on the tender of the engine that struck decedent, such evidence was sufficient to charge defendant with negligence in failing to carry a light on the rear of the tender of the engine to warn pedestrians of its approach.

**Same—Licensees—Contributory Negligence.†**—That defendant railroad company permitted the public, including decedent, to use its yards as a common passageway, and thereby obligated itself to observe ordinary care to avoid injuring them, did not relieve decedent from the obligation to use ordinary care for his own safety.

**Death—Presumptions—Self-Preservation.‡**—In an action for wrongful death, the presumption that decedent was in the exercise of due care based on the instinct of self-preservation is inapplicable where the surrounding facts and circumstances conclusively establish contributory negligence.

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\*See foot-note appended to *Baltimore & O. R. Co. v. Baldwin* (C. C. A.), 21 R. R. 380, 44 Am. & Eng. R. Cas., N. S., 380; foot-notes appended to *Ives v. Wisconsin Cent. Ry. Co.* (Wis.), 20 R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393; foot-notes appended to *Keiser v. Lehigh Valley R. Co.* (Pa.), 20 R. R. 303, 43 Am. & Eng. R. Cas., N. S., 303.

†For the authorities in this series on the subject of the care required of licensees, see foot-notes appended to *Colorado & S. Ry. Co. v. Sonne* (Colo.), 18 R. R. 727, 41 Am. & Eng. R. Cas., N. S., 727.

‡See foot-notes appended to *Wilson v. Lake Shore, etc., Ry. Co.* (Mich.), 21 R. R. 356, 44 Am. & Eng. R. Cas., N. S., 356.

**Rich v. Chicago, etc., Ry. Co**

**Railroads—Persons on Track—Licensees—Death—Contributory Negligence.**—Decedent, a man 39 years old, possessed of unimpaired senses of sight and hearing, undertook for his own purposes to cross defendant's railroad tracks in a yard on a dark night when he knew engines and cars were liable to be constantly moving on them. On reaching one of the tracks on which a large road engine and tender was backing at the rate of six miles an hour, he stepped on the track and was run over and killed before he could escape. The engine was necessarily making much noise, and the bell was being constantly rung, though there was no light on the tender. Held, that the physical facts conclusively established that he was guilty of contributory negligence as a matter of law.

In error to the Circuit Court of the United States for the Northern District of Iowa.

*Charles A. Dickson* (*Sam Page*, on the brief), for plaintiff in error.

*W. H. Farnsworth* (*Delos C. Shull* and *J. U. Sammis*, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILLIPS, District Judge.

ADAMS, Circuit Judge, This was an action instituted under authority of the statutes of Iowa by Carrie Rich, as administratrix of the estate of Hamilton Rich, deceased, to recover damages occasioned by his death. The scene of the accident was the switching yard of defendant company in Sioux City, Iowa. In this yard defendant stores its cars when not in use and makes up its trains for use. It extends from Third street on the north to a little beyond Second street on the south and from what was known as Division street on the east, six or seven blocks westerly. South of and contiguous to the defendant's yard are located the yards of other railroad companies, so that the entire region south of Third street and west of Division street for several blocks is used almost exclusively for yard purposes. Besides making use of its yard for the purposes indicated, defendant's main line for Chicago on the east and for South Dakota on the west runs through it. East of and near to Division street is located defendant's roundhouse, and its locomotives are driven back and forth upon its tracks through the yard when beginning or ending their runs. In these several ways the yard is constantly the scene of great business activity by the defendant. Decedent had lived for some weeks on the north side of Third street in full view of the yard and was familiar with all the uses made of it by defendant. At about 8:30 p. m. of May 17, 1904, the evening being dark, he left his home for some undisclosed purpose; went south a distance of some 200 or 300 feet and apparently was endeavoring to walk across a space covered by seven or eight parallel railway tracks, with the usual accompaniment of switches, guards, and frogs, when he was struck and killed by an engine slowly backing from the west to

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the roundhouse. It was found later that his shoe had been caught in a frog; the sole and heel of it were found wedged or made fast in the frog after the engine had passed by. Plaintiff in her petition charged that defendant had so permitted the public to cross its yards as to establish an implied license to do so; thereby obligating itself to the exercise of watchfulness and care in switching its cars and operating its engines and trains, with due regard to the rights of licensees. She further charged as the specific acts of negligence on defendant's part which resulted in the death of her husband: (1) That the engine which ran upon him was being operated at a high and unlawful rate of speed; and without (2) ringing a bell; (3) sounding a whistle; (4) maintaining a lookout; or (5) carrying a light on the rear of the tender, to warn pedestrians of its approach. Defendant denies the alleged negligent acts, and pleads contributory negligence on the part of the decedent.

There is some evidence of the use of the yard by workmen and their children going to and returning from the bridge which crosses Floyd river on the way to Culahay's packing house where they were working; but if the decision of this case depended upon establishing the existence of a license in favor of the public to traverse defendant's tracks we should have great doubt as to the sufficiency of the evidence to establish it. But, in the view we take of other questions, it is unnecessary to discuss this one. There is no evidence tending to show that the engine was being backed at a high or improper rate of speed. On the contrary, it was conclusively shown, and is so conceded in argument by plaintiff's counsel that the engine was moving at a very moderate rate of speed. Was there any evidence that no bell was rung or whistle sounded by those in control of the engine as it approached the place where the decedent was attempting to cross the track? Carrie Rich, the widow of decedent, testified that she and a neighbor were standing on her back doorstep at the time her husband left the house. The place where he was hurt was more than a block south from the house, on a track running east and west between two others on each of which stood strings of cars, while another string of cattle cars was standing across Division street, a short distance east. She and her neighbor, with whom she was at the time visiting, testified merely that they did not hear any bell ring or any whistle sound before the accident occurred. They gave no reasons indicating that they would have heard either if it had rung or sounded. Moreover, the proof shows that their attention was not in any manner directed to what was going on in the yard. They say they heard a shout or scream, which was either simultaneous with or after the accident, and that it was the first incident that directed their attention to the yard that evening. The proof shows that they were neither actual observers of the condition of things attending the accident, nor were their situation or engagements such as would likely have enabled them to know anything about the operation of the particular engine in question prior to the accident.



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The only other witness who testified for plaintiff on this subject was Ed. Wilson, who stated that after decedent left his home he started and followed about half a block behind him. He testified that his attention was not called to any of the circumstances attending the accident until after he heard a cry or loud groan (probably the one emanating from the decedent at the time he was hurt); that on hearing the cry, he ran and got to the decedent about two minutes after the accident occurred. He said he did not see the engine backing down because there was a string of cars between him and it, and that there was another string of cars on the south side of the engine as it backed eastwardly. Situated as thus indicated, with no actual observation of the operation and with a string of cars so intervening between him and the engine as to make notice of its operation unlikely, this witness also said he did not hear any bell ring or whistle sound. Like the other two witnesses he did not give any reasons why he would likely have noticed either if it had occurred, and his occupation at the time was such as afforded him neither interest in what was going on nor favorable opportunity to observe it.

In these circumstances the evidence under consideration was purely of a negative character and does not command itself to common intelligence or common experience as of any value. The witnesses may not have heard any warning given and yet it may have been given. The value of such evidence depends upon the existence of facts showing the likelihood that the warning would not have been given if the witnesses did not hear it. Such facts are absent in this case and we are left with the bald statement that the witnesses did not hear the warning as the only evidence that it was not given. They lived close to the yard and, as common experience teaches, had doubtless become so accustomed to the constantly ringing bells and sounding whistles as to be totally indifferent to them. As against this kind of evidence there is the positive testimony, unchallenged as to credibility, of the engineer and fireman who were at work on the engine in question, and two others who stood near by and in front of it as it was moving eastwardly, that the bell on the engine was constantly ringing as it was being backed eastwardly that night. This evidence afforded by the two men whose duty it was to ring the bell, and by two others who actually saw the engine and noted its operations is positive and unequivocal in its character. The testimony of plaintiff's witnesses, on the other hand, was of such a character, and attended by such circumstances as to be entirely true without affording any evidence of the fact sought to be established. This court has heretofore decided that in circumstances of the kind just disclosed there is no real conflict of evidence.

In the case of *Chicago, etc., Ry. Co. v. Andrews*, 64 C. C. A. 399, 130 Fed. 65, speaking by Judge Van Devanter it said:

"But where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see

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or hear, and where their situation was not such that they probably would have observed it, their testimony is not inconsistent with that of credible witnesses who were in a situation favorable for observation, and who testify affirmatively and positively to the occurrence."

In the case of *Baltimore & O. R. Co. v. Baldwin* (C. C. A.) 144 Fed. 53, the Circuit Court of Appeals for the Sixth Circuit examined the question now under consideration and announced its conclusion in the following words:

"The result must be that purely negative testimony is not substantive, and amounts at most to nothing more than a mere scintilla."

To the same effect are the following cases: *Stitt v. Huidekoper*, 17 Wall. 384, 21 L. Ed. 644; *Horn v. Baltimore & O. R. Co.*, 4 C. C. A. 346, 54 Fed. 301; *Hubbard v. Boston & Albany Railroad*, 159 Mass. 320, 34 N. E. 459; *Culhane v. New York Central & H. R. R. Co.*, 60 N. Y. 133, 137. In the last-mentioned case, the Court of Appeals of New York had facts before it quite apposite to those now before us and said concerning them as follows:

"It is proved by the positive oath of the two individuals on the engine—one of whom rang it, and by two others who witnessed the occurrence and heard the ringing of the bell. The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal. \* \* \* As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere 'I did not hear' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of the fact."

While the foregoing rule is a valuable one to prevent speculative and unwarranted verdicts and should be fearlessly applied in appropriate cases, no liberty should be taken by the trial judge under its supposed protection to weight the force or value of evidence which is substantially contradictory. Where "circumstances attending the failure to notice an occurrence are such as afford reasonable ground to believe that if the occurrence had happened it would have been noticed by the witness, the failure to notice it may be and frequently is some evidence that it did not occur and should go to the jury for its consideration;" but when, as in this case, the failure to notice an occurrence is attended by no facts or circumstances tending to show that the witnesses would likely have noticed it if it had occurred, it should never be availed of to excuse an unwarrantable verdict. There

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was no evidence to support the fourth specification of negligence, namely, that the defendant failed to maintain a lookout to warn the decedent of the approach of the engine.

Concerning the fifth specification, Ed. Wilson testified that when he came up to the track where decedent was hurt he noticed there was no light on the tender of the engine. This is affirmative and positive testimony, and while it is denied by other witnesses, it constituted some evidence of the fifth act of negligence charged. We are therefore required to consider the other branch of the case relating to contributory negligence. If the defendant had so permitted the public, including decedent, to use its yards as a common passageway and thereby obligated itself to the observance of ordinary care to avoid injuring them, and even if it was guilty of negligence in not maintaining a light on the rear of the tender as it backed eastwardly on the evening in question, these facts would not have relieved decedent from the obligation imposed by law to take ordinary precaution for his own safety. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542. If he failed to do so and if such failure contributed in any degree to his death his personal representative cannot recover. If, from all the proof and the just and reasonable deductions from it, the contributory negligence is so conclusively established that all reasonable men in the exercise of an honest and impartial judgment would so say it was the duty to declare as a matter of law that no recovery could be had. *Chicago G. W. Ry. Co. v. Price*, 38 C. C. A. 239, 97 Fed. 423, 428; *Chicago G. W. Co. v. Roddy*, 65 C. C. A. 470, 131 Fed. 712; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. Counsel for plaintiff recognizes the foregoing well-settled rules, and in endeavoring to exculpate the decedent from the charge of contributory negligence urges that the instinct of self-preservation is so strong as to create a presumption evidential in its character that the decedent was in the exercise of due care, and that that presumption was sufficient evidence to take the case to the jury. The presumption referred to is like other presumptions of fact. It is available in cases where there is an absence of evidence showing the actual occurrence, but like other presumptions it ceases in the light of actual facts. We recognize its evidential value in the former class of cases, as illustrated by *Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186, and *Northern Pac. Ry. Co. v. Spike*, 57 C. C. A. 384, 121 Fed. 45, but this court on repeated occasions has recognized and enforced limitations attending its use.

In *Tomlinson v. Chicago, etc., Ry. Co.*, 67 C. C. A. 218, 134 Fed. 233, 234, it is said that:

"The presumption cannot stand against positive and uncontradicted proof such as was presented in this case, that had he taken those precautions which the law required of him he could plainly have seen the approach of the train in time to avoid the danger. \* \* \* The presumption of the exercise of due care is at variance with the physical facts."

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In *Rollins v. Chicago, etc., Ry. Co.*, 71 C. C. A. 615, 139 Fed. 639, it is said:

"The presumption that the deceased used due care is destroyed by the force of physical facts shown by uncontradicted evidence, \* \* \* " etc.

In *Wabash R. Co. v. De Tar*, 73 C. C. A. 166, 141 Fed. 932, 934, it is said:

"Because the natural instinct of self-preservation generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of the actual fact in any instance, a presumption of the exercise of due care and caution. \* \* \* But it is a presumption of fact, not of law, and, like other presumptions arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, it is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it."

Do the actual facts of this case countervail the presumption? Decedent was in the meridian of life, 39 years old, possessed of unimpaired senses of seeing and hearing. He undertook, for purposes of his own, to cross the tracks of the defendant in a dark night, when, as known by him, engines and cars were liable to be constantly moving on them. He reached one of the tracks upon which an engine with tender was backing. The engine was a large road engine going at about a rate of six miles per hour and necessarily making much noise. Its bell, as seen from the evidence already considered, was being constantly rung. Notwithstanding these facts he stepped upon the track and was run over and killed by the approaching engine.

In the light of the foregoing facts, and in view of the following considerations we do not think he exercised ordinary care. It was of doubtful prudence on his part to venture upon defendant's tracks in the darkness of the night when he knew they were subject to constant use as already indicated. The tracks were warnings of danger, and the known and frequent use of them required the greatest circumspection on his part, both by looking and listening for the approach of an engine or train of cars. He could not have looked or listened as he entered upon the track. If he had looked attentively, he would have seen the large road engine that moment making its way towards him on the track he was just about to step upon. If he had listened, he would have heard the rumbling noise or the ringing of the bell. If, notwithstanding these obvious and indispensable precautions, he saw fit to try to make the crossing in advance of the engine, he was guilty not only of want of ordinary care, but of great recklessness. If he had not looked or listened he was, according to all authority and reason, guilty of negligence in not taking that reasonable precaution to prevent exposure which his environment imperatively demanded. His environment was such that he ought reasonably to have anticipated danger at every step, and every precaution suggested by the alert and attentive use of all his

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senses should have been taken. This he failed to take. The physical facts, in our opinion, conclusively show that he must have thoughtlessly and heedlessly stepped upon the track, and that he did so almost simultaneously with the approach of the engine (for he was not able to cross the track before he was hit by it); or they show that he entered upon the track prior to the approach of the engine and caught his foot in a frog, and was so held as to disable him from completing the crossing before he was injured. The latter contingency is not presented by his counsel, and no claim is made that the existence of the frog, blocked or unblocked, in defendant's switching yard is in itself such evidence of negligence as to constitute the basis of an action. For apt illustrative cases denying plaintiff's right of recovery because of his contributory negligence, reference may be made to the following cases; *Rollins v. Chicago, etc., Ry. Co.*, *supra*; *Tomlinson v. Chicago, etc., Ry. Co.*, *supra*; *Missouri Pac. Ry. Co. v. Mcseley*, 6 C. C. A. 641, 57 Fed. 921; *Tucker v. Baltimore & O. R. Co.*, 8 C. C. A. 416, 59 Fed. 968; *St. Louis, etc., R. Co. v. Chapman*, 71 C. C. A. 523, 140 Fed. 129; *Ames v. Waterloo, etc., Company*, 120 Iowa, 640, 95 N. W. 161.

We think the learned trial judge of the Circuit Court committed no error in directing a verdict for defendant, and its judgment is affirmed.

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**HOBACK'S ADM'R v. LOUISVILLE, H. & ST. L. RY. CO.**

(Court of Appeals of Kentucky, Jan. 16, 1907.)

[99 S. W. Rep. 241.]

**Railroads—Trespassers—Care Required.\***—Where the use of a railroad company's tracks at the place in question by pedestrians had been confined largely to Sundays and to reasonable hours in the daytime, the railroad company was not bound to expect or required to be on the lookout for trespassers on the track at the point at midnight.

**Same—Private Crossing—Signals.†**—A railroad company is not required to sound the whistle, ring the bell, or give other notice of the approach of its engine to a private crossing located in a sparsely settled neighborhood in the country.

**Same.\***—Where intestate was a trespasser on defendant's railroad track at night, and the operators of the train by which he was killed could not have seen him because of a curve in the track until it was too late to prevent the injury, the railroad company was not responsible for his death.

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\*See generally, extensive note, 21 R. R. R. 218, 44 Am. & Eng. R. Cas., N. S., 218.

†See foot-notes appended to *Azers v. Wabash R. Co.* (Mo.), 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; foot-notes appended to *Wilson's Adm'r v. Chesapeake & O. Ry. Co.* (Ky.), 16 R. R. R. 103, 39 Am. & Eng. R. Cas., N. S., 103.

**Hoback's Adm'r v. Louisville, etc., Ry. Co**

Appeal from Circuit Court, Daviess County.

Action by William Hoback's administrator against the Louisville, Henderson & St. Louis Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

*Geo. W. Jolly*, for appellant.

*Helm & Helm*, for appellee.

LASSING, J. In August, 1904, William Hoback, in company with another young man, was run over and killed by one of appellee's trains. His administrator instituted this suit in the Daviess circuit court seeking to recover for the death of his intestate, on the ground of gross negligence, carelessness, and recklessness of the appellee company in the operation of its trains.

On the trial of the case the following facts were developed: On the night in question the deceased and a young friend were returning to their home from a party, about, or shortly after, midnight. The public road ran alongside of, and almost parallel with, the railroad track, though upon lower ground, and the deceased and his companion were walking upon the railroad track, rather than along the road. There was a private crossing about 500 feet from the point where the deceased was struck and killed. The nearest public crossing was more than 1,800 feet from the place where he was killed. Deceased was killed on a curve, known as a "4-degree" curve, around Bar Harbor hill. The private crossing had been used by the railroad company in getting to a coal dump, and was also used to some extent by the community at large, though it was fenced off and barred by gates, and the railroad company had erected a signpost there, with the words "Railroad Crossing" upon it. It was in proof that the people in that neighborhood had frequently used the railroad track, rather than the county road, in walking to and from the neighboring towns. It was not a thickly settled locality. There were not over 10 or 12 houses within a radius of half a mile of the place where the killing occurred. The train which ran over deceased did not blow its whistle, ring its bell, or give any warning of its approach to the private crossing, just beyond which deceased was killed. It was running at a high rate of speed. Deceased could not see the train, and perhaps was unable to hear it until it was almost upon him, because of the curve in the track at that place. This was the evidence, at the conclusion of which, on defendant's motion, the court instructed the jury to find for the defendant. From this ruling the plaintiff appeals.

It is insisted by appellant most earnestly that it was the duty of appellee, when running its trains over its roadbed at such a high rate of speed, to sound its whistle, ring its bell, or give warning of its approach to the private crossing on the night in question, and that this is especially true because of the twofold



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fact that the railroad company had erected a signpost at this crossing calling the attention of the public to the fact that it was a railroad crossing, and for the reason that the people living in that locality had been in the habit for years of walking along the railroad track rather than upon the county road; and appellant cites many cases in support of his contention. Upon an examination of the authorities cited, however, we find that they are not applicable to the facts in this case. It is true that this court has, in a long line of cases, held that, where a railroad runs through a city or large town or densely populated community, or over a public crossing in a city where a great many people are known to cross daily, it is the duty of those in charge of the train to keep the train under control and to notify the public of its approach. But this rule has never been applied to the operation of trains in the country, or in sparsely settled neighborhoods or communities; but, on the contrary, it has been repeatedly held that a railroad company is not called upon nor required to sound its whistle, ring its bell, or give notice of its approach to a private crossing.

Even though appellee knew that its track, at the place in question, was used by people in that locality, and had been so used in passing from their homes to the neighboring villages, yet this use, so far as the proof shows, had been confined principally to Sundays and to reasonable hours in the daytime, and appellee would certainly have no right to expect nor be required to be on the lookout for trespassers upon its track at the dead hour of midnight.

From the facts proven it is evident that the appellant's intestate was a trespasser upon the right of way at the place where he was killed; and, as said by Judge Paynter in the case of *C. & O. Ry. Company v. See's Adm'r*, 79 S. W. 252, 25 Ky. Law Rep. 1995: "It is a well-settled rule in this state that those in charge of a train owe no duty to a trespasser, except when his presence is discovered upon the track to use ordinary care to avoid injuring him. This rule has been so repeatedly enunciated by this court that it would be labor lost to cite cases in its support. There is no duty resting upon those in charge of a train to sound whistles or ring bells or carry headlights to give warning to trespassers." The rule laid down in this case, it seems to us, settles beyond all question the right of appellant to recover in the case at bar. The deceased was a trespasser upon the track. The company owed him no duty to notify him of the approach of its train. The proof shows that it would have been impossible for those in charge of the train to see him until it was too late to prevent the injury.

The judgment is affirmed.

## HAYWARD v. NORTH JERSEY ST. RY. CO.

(Court of Errors and Appeals of New Jersey, March 4, 1907.)

[65 Atl. Rep. 737.]

**Trial—Motions for Nonsuit and Direction of Verdict.**—Motion for nonsuit, and for direction of verdict for defendant is in effect a demurrer to so much of the whole testimony as is favorable to plaintiff, admitting its verity in point of fact for the purpose of denying its sufficiency in point of law.

**Same—Conflicting Evidence.**—Plaintiff's cross-examination, tending to show lack of ordinary caution, was contradictory to testimony on direct and to testimony of other of plaintiff's witnesses. Held that, on motions to nonsuit and to direct a verdict for defendant, the trial judge could not ignore testimony of other witnesses for plaintiff in favor of plaintiff's testimony on cross-examination, nor pass upon conflicting claims to credibility.

**Street Railroads—Injury to Pedestrian.**—In an action against a street railway company for injuries received by a foot passenger struck by a car of the defendant while crossing a public street, it was established that when and where the accident occurred there was a sign, placed over the tracks by the defendant corporation, requiring cars to "run slow." Held, that this requirement, adopted by the defendant corporation previous to the accident, for the guidance of its servants in matters relating to the safety of the public, and made public, created a duty as to such persons as would be likely to be injured by a failure to observe the precautions prescribed. Proof of a violation of such requirement by the motorman, directly resulting in injury to the plaintiff, is evidence, although not conclusive, from which the jury would be warranted in finding the motorman negligent and the defendant therefore liable.

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Carrie Hayward against the North Jersey Street Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

*Bedle, Edwards & Holmes*, for plaintiff in error.

*Warren Dixon*, for defendant in error.

DILL, J. The plaintiff below, while crossing Newark avenue, Jersey City, was struck by a trolley car of the defendant company, receiving injuries for which she recovered damages in the Hudson circuit court. The writ of error in this case presents the question as to whether the circuit judge erred in refusing both to nonsuit the plaintiff, and in refusing to direct a verdict for the defendant, upon the ground that contributory negligence had been shown upon the part of the plaintiff. The case was submitted to the jury, and they found for the plaintiff. It is not for this



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court to consider what its verdict would be on the printed case, but whether, on the evidence, the circuit judge could have taken the case from the jury.

The undisputed facts were that the plaintiff below, a young lady, while crossing on foot from the southerly to the northerly side of Newark avenue, in Jersey City, at about 10 o'clock at night, was struck by a car of the defendant company. Her leg was broken, and she received other injuries. In the immediate locality where the accident occurred there was a public trolley sign, suspended over the tracks by the defendant corporation, requiring cars to "Run Slow!" Immediately preceding the accident, a police patrol wagon was being driven in a westerly direction, up Newark avenue, on the northerly side of the street, at a rapid pace; the horses galloping, the gong sounding and otherwise creating disturbance and confusion in the street. The plaintiff waited for it to pass, and immediately thereafter was struck by the left-hand or northerly side of the fender of an east-bound car on the southerly track. Her attention was attracted by the patrol wagon to the exclusion of other objects in the street. She did not see the car approaching, and there is no evidence that she looked to ascertain whether a car was approaching. The disputed question was as to where she waited for the patrol wagon to pass. The evidence of the plaintiff on the direct, and that of other witnesses in her behalf, was that she was in the act of crossing, had passed across or nearly across the southerly or east-bound track; and at that point, hearing the patrol wagon coming on the track in front of her, she stopped and waited for it to pass, and while thus waiting between the tracks was struck by the car. The insistent of the defendant was that while the plaintiff was in a place of safety, on or near the sidewalk, and before she had crossed either of the tracks, her attention was attracted by the oncoming patrol wagon, and that in such place of safety she waited, and, after it passed, started across the southerly track without looking to see whether any car was approaching, and was thus struck by the oncoming car.

The defendant below, both on the motion for a nonsuit and for a direction of a verdict, relied upon the testimony of the plaintiff upon cross-examination, where she said: "Q. Did you see this car at all? A. No, sir. Q. You weren't looking? A. I was looking at the patrol, that is what took my attention. Q. You heard it coming? A. Yes, sir. Q. You were about to cross the street? A. Yes, sir. Q. And waited until it got by? A. Yes, sir. Q. Then you crossed the street? A. Yes, Q. Hurriedly or slowly? A. Well, I was not hurrying to get out of the way of anything. I was going right across. Q. Looking straight ahead? A. Well, as I say, my attention was taken up by the patrol wagon. Q. You didn't hear anything else? A. I heard the clatter of the patrol bell. Q. That made quite a noise? A. Yes, sir. Q. You didn't look where you were going, except going across the street? A. Yes, sir." This testimony, the plaintiff in error contends, disclosed a failure

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of the plaintiff below to exercise ordinary caution. Assuming for the purpose of this discussion that this evidence was susceptible of the construction placed upon it by the plaintiff in error, and permitted no other legitimate inference, nevertheless, because such testimony thus construed was directly at variance with the testimony of the plaintiff below on her direct, and with the evidence of other witnesses called in her behalf, it could not avail the defendant upon its motion either for a nonsuit or for a direction of the verdict. The trial judge could not ignore the testimony of other witnesses for the plaintiff in favor of that given by her on cross-examination, nor pass upon conflicting claims to credibility. The motion was in effect a demurrer to so much of the whole testimony as was favorable to the plaintiff, admitting its verity in point of fact for the purpose of denying its sufficiency in point of law. *Kaufman v. Bush*, 69 N. J. Law, 645, 56 Atl. 291.

Therefore, in dealing with the question before us, we must assume that the plaintiff was in the act of crossing the street, had crossed the southerly or east-bound tracks, when she was held up by the patrol wagon coming on the track in front of her; that while thus waiting between the tracks, immediately after its passage, she was struck by the trolley car running at a high rate of speed and without warning signals. Hence, although the plaintiff's attention was so wholly taken up with the passing of the patrol wagon that she did not see the east-bound car, and did not look for its approach, nevertheless there would be an issue for the jury. *Traction Co. v. Scott*, 58 N. J. Law, 682, 694, 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620; *Connelly v. Trenton Passenger Ry. Co.*, 56 N. J. Law, 700, 704, 29 Atl. 438, 44 Am. St. Rep. 424. A legitimate inference would be that the plaintiff had begun to cross the highway before the trolley car had approached so near that it could not be stopped by the motorman, and while it was sufficiently distant to have avoided striking the plaintiff, but for either the rate of speed at which the car was progressing, or from inattention on the part of the motorman. In corroboration of the testimony that the car came down upon the plaintiff at a dangerous rate of speed, there was evidence that after the plaintiff was struck she was dragged by the trolley car some 20 or 25 feet, and that the car ran by the place where the accident occurred some 75 or 100 feet before it stopped. From this the jury might find that the car was running at an unreasonable rate of speed prior to the effort made by the motorman to stop it. *Zolpher v. Camden & Sub. Ry. Co.*, 69 N. J. Law. 417, 418, 55 Atl. 249. Under the evidence that no warning signal of approach was given by the trolley car, it was for the jury to say whether the omission of such signal was a proximate cause of the accident. *Consolidated Traction Co. v. Chenoweth*, 61 N. J. Law, 554, 559, 35 Atl. 1067. Whether, at the point where the plaintiff was crossing the street and was injured, there was a regular, recognized street crossing, the evidence was not clear on the plaintiff's case, and on the whole case was conflicting. This question also was properly left to be determined by the jury.

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Furthermore, we have the fact, and undisputed, that when and where the accident occurred there was, and for some time previously had been, over the tracks a public sign of the defendant company requiring the cars to "Run Slow!" This requirement, adopted and made public by the defendant corporation previous to the accident, for the guidance of its servants in matters relating to the safety of the public, created a duty of obedience as between the employees and the company, and disobedience of the order by the servant is negligence as between the employer and the servant. If such disobedience injuriously affects a third person it is not to be assumed, in favor of the master, that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to be held, as an implication, that there was a breach of duty towards the party injured, as well as towards the master who prescribed the conduct that he thought was necessary or desirable for protection in such cases. The rule is thus formulated, the principle ably discussed, and the authorities marshaled by Chief Justice Knowlton in *Stevens v. Boston El. Ry. Co.*, 184 Mass, 476, 69 N. E. 338. As against the company defendant, the methods which it has adopted for the protection of others are some evidence of what the company deems necessary or proper to insure their safety. *Dublin, W. & W. Ry. Co. v. Slattery*, in the House of Lords, is in point. Slattery was killed by an express train passing through a way station, and "the only negligence alleged against the appellants" (the railway company) "Was that the express train from Dublin did not whistle before or as it passed through the station, and it was suggested that had it whistled it would have acted as a caution to Slattery, and he would not have attempted to cross the line." There was no special statutory duty imposed on the company of whistling at a station (page 1172), but the rule of the railway required express trains to whistle passing every station. As to whether the whistle was sounded, the evidence was conflicting. The Lord Chancellor (Lord Cairns) said: "Although it would, as it seems to me, be difficult to lay down an abstract rule as to the necessity of whistling, it may be taken that the orders given to the engine driver showed that the appellants considered whistling under the circumstances to be a reasonable and proper precaution, and it might have been, and I think it was, right to tell the jurors that if they found this precaution neglected on this occasion they might consider it to be evidence of negligence on the part of the appellants." *Dublin, W. & W. Ry. Co. v. Slattery*, 3 App. Cas. 1155, 1164.

In the case at bar, the requirement that cars should be run slowly at this point created a duty of obedience on the part of the defendant's employees, not only to the company but as well on the part of both the corporation and its employees to such persons as would be likely to be injured by a failure to observe the precautions thus prescribed. The plaintiff, being familiar with this requirement thus made public, had therefore the right to assume that servants of the company would comply with its terms, and

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that at this point cars would run slowly. It therefore follows that proof of a violation of such requirement, adopted and made public previous to the accident, resulting in injury to the plaintiff, was evidence, although not conclusive, from which the jury would be warranted in finding that the motorman was negligent, and the defendant therefore liable. All of these questions of fact the circuit judge in his charge fully and fairly left to the jury, and in terms of which the plaintiff in error cannot and does not complain. When the request to nonsuit was made, it was obviously impracticable for the trial judge to say what facts had been established, and, when the motion for the direction of a verdict was made, the facts on the whole case as presented were impossible of reconciliation. Therefore, the real facts could only be determined by a jury settling the credit to be given to witnesses, weighing and comparing their varying testimony. Under such circumstances it would have been error to have withdrawn the case from the jury. *Newark Passenger Railroad Co. v. Block*, 55 N. J. Law, 605, 608, 27 Atl. 605, 22 L. R. A. 374.

The judgment of the circuit court, therefore, is affirmed.

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**MAYBERRY v. NORTHERN PAC. RY. CO. *et al.***

(Supreme Court of Minnesota, Jan. 25, 1907.)

[110 N. W. Rep. 356.]

**Master and Servant—Negligence of Servant—Joint Action.\***—Joint action against a master and his servant may be maintained, when based upon the negligent or other act of the servant for which the master is liable.

**Actions—Joinder of Causes.**—When several acts of negligence concur in giving rise to a single right of action, they may be united in the same complaint, under section 4154, Rev. Laws 1905, which permits several causes of action to be joined in the same pleading, when they arise out of the same transaction or transactions.

**Contribution—Tort-Feasors.**—The rule that the right of contribution does not exist as between joint tort-feasors has no application to torts which are the result of mere negligence.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; H. D. Dickinson, Judge.

Action by Christina Mayberry, administratrix of Alfred Mayberry, deceased, against the Northern Pacific Railway Company and others. Demurrers to the complaint were overruled, and defendants appeal separately. Affirmed.

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\*See foot-notes appended to *Southern Ry. Co. v. Grizzle* (Ga.), 20 R. R. R. 451, 43 Am. & Eng. R. Cas., N. S., 451.

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*C. W. Bunn and L. T. Chamberlain*, for appellant Northern Pacific Ry. Co.

*C. D. & R. D. O'Brien*, for appellants.

*Wilson and Julian F. D. Larrabee*, for respondent.

BROWN, J. This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendants. The railroad company and individual defendants separately demurred to the complainant, assigning as ground thereof that two causes of action were improperly united therein. The demurrers were overruled, and separate appeals taken to this court. The only question presented is whether the demurrers were well taken.

The complaint alleges substantially the following facts: (Plaintiff's intestate,) at the time of the accident causing his death, was in the employ of defendant railroad company as a switchman in its yards at Minneapolis. Defendants Wilson and Julian were also in the employ of defendant company in the same yards and were fellow servants of deceased. Wilson was employed in the capacity of engineer, and engaged in operating a switch engine, and Julian was a switchman. While deceased was in the due discharge of his duties, and without fault on his part, he received certain injuries to his person, resulting in his death, caused and occasioned, as alleged in the complaint, by the negligence of defendants in two respects, viz.: (1) That defendant company was guilty of negligence, contributing to his death, in placing, or causing to be placed, a car upon a side track in such close proximity to an adjoining track near a switch that deceased came in contact therewith while riding upon another car on an adjoining track, knocking him therefrom and upon the track, upon which a car was then approaching; and (2) that the other defendants, fellow servants of deceased, were guilty of negligence, contributing to his death, in failing to observe certain signals given them by deceased to go forward, instead of doing which they caused the engine and cars then under their control to back over and upon the body of deceased, immediately after he was knocked from the car alleged to have been negligently placed upon the adjoining track by the company. There are no allegations connecting Wilson and Julian with the act charged against the company in placing the car so close to the adjoining track as to leave insufficient space for the passage of other cars being switched in the yards. Negligence in this respect is charged against the company alone. Nor is the company charged with misconduct or failure or duty in connection with the alleged negligence of Wilson and Julian; recovery being sought against it for their negligence under the fellow servant statute. It is contended by defendants that there is an improper joinder of causes of action, for the reasons (1) that the negligence of the company in rendering the place in which deceased was required to perform his work unsafe, by placing the car which struck him in an improper position, has no connection with the negligence of Wilson



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and Julian in causing another car to run upon and kill him, and (2) that the cause of action against Wilson and Julian arises at common law by reason of their negligence, and is wholly disconnected with the statutory liability of the company—in other words, that the liability of each defendant is separate and independent, giving rise to separate actions for damages, and consequently cannot be united in the same complaint.

The principal question presented, as we view the case, is whether the statutory liability of the railroad company and the common-law liability of the fellow servants of deceased may be united in the same complaint. The alleged negligence of the company in placing the car upon the side track is but an incidental fact, inseparably connected with and concurring in the accident, and in no proper view an independent cause of action. *Railway Co. v. Mothershed*, 97 Ala. 261, South. 714. So we turn our attention to the question whether the statutory liability of the company may be joined in the same action with the common-law liability of the fellow servants, and a joint recovery be had against both. In the case at bar, this question narrows down, it would seem, to whether there is a misjoinder of parties defendant, rather than an improper joinder of causes of action. Plaintiff has but one cause of action, viz., the wrongful acts of defendants in causing the death of her intestate; and this right of action exists by virtue of the statutes which authorize suit in such cases by the administrator of the estate of the deceased person. It is a single right of action, and is not rendered double by reason of the fact that it has its origin in the separate negligent acts of defendants. So the real question is whether, under the circumstances disclosed by the allegations of the complaint, defendants may be proceeded against jointly.

We have no statute in this state fixing any rule upon the subject of the joinder of parties defendant in actions in tort. Section 4062, Rev. Laws 1905, refers only to actions upon contract. We must, therefore, refer to the rules of the common law controlling the question in determining whether the action at bar was properly brought against all the defendants. An examination of the books discloses an irreconcilable conflict in the decisions upon the question. It is held by some courts that separate persons, acting independently, but causing together a single injury, are joint tort-feasors, and may be sued either jointly or severally at the election of the plaintiff, and that it is not essential that the defendants in such case shall have acted in concert. *Matthews v. Railway Co.*, 56 N. J. Law, 34, 27 Atl. 919, 22 L. R. A. 261; 15 Enc. Pl. & Pac. 559. Other courts uphold the converse of the proposition, maintaining the rule that joint or concerted action on the part of all the defendants is essential to the right of joinder in the same suit. *Parsons v. Winchell et al.*, 5 Cush. (Mass.) 592, 52 Am. Dec. 745. The case of *Trowbridge v. Forepaugh*, 14 Minn. 133 (Gil. 100), may be said to support this view. We do not feel called upon, however, to analyze the cases on this subject, for the purpose of evolving a rule applicable to tort ac-

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tions in general; for the weight of authority sustains the right of an injured party to join in the same action parties bearing the relation to each other of the defendants in this case, namely, master and servant, the right to action springing from the wrongful act of the servant for which the master is responsible. The authorities even upon this branch of the subject are by no means harmonious, but the weight of reason sustains the right of joinder. The following authorities sustain this position: *Newman v. Fowler*, 37 N. J. Law, 89; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911; *Wright v. Crompton*, 53 Ind. 337; *Ice Co. v. Kiefer*, 26 Ill. App. 466; *Railway Co. v. Sittasen* (Ind. App.) 74 N. E. 898; *Lynch v. Elektron Mfg. Co.* (Sup.) 88 N. Y. Supp. 70; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; *Colegrove v. Railway Co.*, 20 N. Y. 492, 75 Am. Dec. 418; *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178.

No substantial reason can be given for requiring separate actions in such cases. On the contrary, the orderly administration of justice will be conserved by permitting the joinder. Both parties are liable for the consequences of the negligent acts of the servant, and one action and one recovery will terminate the litigation and avoid the necessity of separate trials of the same issue. So long as the liability of each defendant is identical, upon the same state of facts, it is of no material consequence that the liability of one arises at common law and that of the other under the statutes imposing liability upon the master for the negligence of his servants. One of the principal reasons assigned by those courts which hold such a joinder improper is that the right of contribution is lost and cannot be restored to by one against the other codefendant. This reason, as applied to cases of this kind, is unsound. There is, it is true, a general rule that the right of contribution does not exist as between joint tort-feasors; but it applies only between persons who by concert of action intentionally commit the wrong complained of. Where there is no concert of action in the commission of the wrong, the rule does not apply. In such cases the parties are not in *pari delicto* as to each other, and as between themselves their rights may be adjusted in accordance with the principles of law applicable to the relation in fact existing between them. The rule does not apply to torts which are the result of mere negligence. *Ankeny v. Moffett*, 37 Minn. 109, 33 N. W. 320; *Churchill v. Holt et al.*, 127 Mass. 165, 34 Am. Rep. 355; *Archeson v. Miller*, 2 Ohio St. 203, 59 Am. Dec. 663; *Torpy v. Johnson*, 43 Neb. 882, 62 N. W. 253; *Adamson v. Jarvis*, 4 Bingham, 66; 9 Cyc. 804; 7 Am. & Eng. Enc. Law, 365. Other reasons assigned in support of the theory that the master and servant may not be joined in the same action are purely technical and entitled to no special consideration.

It would seem, also, that section 4154, Rev. Laws 1905, disposes of the question adversely to appellant's contention, considered from the standpoint of separate causes of ac-

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tion, and not mere joinder of parties defendant. That statute provides that two or more causes of action may be united in one pleading when they arise out of the same transaction or transactions, affect all the parties to the action, and do not require separate places of trial. This authorizes the joinder of separate causes of action when the conditions named in the statute exist, and it is not important that the defendants named are not all affected alike. If the several causes of action pleaded arise out of the same transaction, they may be joined in one suit, although the defendants named may be affected in different degrees of responsibility. That causes of action in tort are included within the meaning of this statute is quite obvious. The word "transaction," as there used, embraces something more than contractual relations. It includes any occurrences or affairs the result of which vests in a party the right to maintain an action, whether the occurrences be in the nature of tort or otherwise. *Lamming v. Galusha*, 135 N. Y. 239, 31 N. E. 1024; *Scarborough v. Smith*, 18 Kan. 399; *King v. Coe Commission Co.*, 93 Minn. 52, 100 N. W. 667. The plaintiff's right of action in the case at bar, as already observed, is for the death of her intestate, and is founded in the wrongful conduct of defendants in the operation of the company's business in its switchyards at Minneapolis. What occurred there, either in committing wrongful acts or negligently failing to take such action or steps as would prevent the injury complained of, amounts to a transaction or transactions, within the meaning of the statute, and the several acts concurring and resulting in the death of plaintiff's intestate may properly be united in the same complaint. In either view of the case, *Trowbridge v. Forepaugh*, *supra*, is not in point. No relation whatever existed between the defendants in that case—either master and servant, principal and agent, or otherwise—and the acts and omissions there complained of as causing the injury, and for such liability existed, were wholly separate and independent. The city was not liable in that case for the negligence of its codefendant, nor was its codefendant liable for its negligence.

Order affirmed.



## ELLIOTT v. LOUISVILLE &amp; N. R. Co.

(Court of Appeals of Kentucky, Jan. 16, 1907.)

[99 S. W. Rep. 233.]

**Railroads—Injury to Persons on Track—Negligence.**—A boy while playing with an apparatus on a car on a switch within the exclusive possession of a railroad company was injured in consequence of the car being moved. The engineer moving the car did not see the boy or know of his danger. There was another boy standing up in one of the coal cars on the switch and one or two others standing near the track at the time of the accident. Held, that there was nothing to show that the engineer did not use reasonable diligence to prevent the accident.

**Same—Trespassers—Care to Prevent Injury.\***—A boy at cars on a switch within the exclusive possession of a railroad company is a trespasser, though persons frequently cross the railroad for their own convenience near the place where the boy was, and the employees of the railroad owed him no lookout duty but were only required to guard against injuring him after his danger was discovered.

Appeal from Circuit Court, Bell County.  
 “Not to be officially reported.”

Action by Lenord Elliott, by next friend, E. N. Ingram, against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

*Weller & Pointz*, for appellant.

*C. W. Metcalf, J. W. Alcorn and Benjamin D. Warfield*, for appellee.

BARKER, J. Leonard Elliott, a little boy between six and seven years old, was run over by one of appellee's freight trains and his arm cut off near the elbow; to recover damages for which this action was instituted in the Bell circuit court by his next friend, E. N. Ingram. The petition sets forth that the accident was caused by the negligence of appellee's employees in charge of its cars. All of the material allegations were controverted by the answer, and upon the trial, after all the evidence was in, the court instructed the jury peremptorily to find a verdict for the defendant. Of this ruling, the appellant complains.

The view we have taken of the question of negligence in this case precludes the necessity of discussing the question of compromise, which is also raised on the record.

The substantial facts are these: Several of appellee's cars were standing upon a switch leading from its main track at Four Mile in Bell county, Ky., to the Black Raven coal mine. These cars

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\*See extensive note, 21 R. R. R. 218, 44 Am. & Eng. R. Cas., N. S., 218.

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were not at or near a public crossing, but were at a point on appellee's switch where it had the exclusive right of possession. Appellant, with several other boys, rode down in a wagon and got out near where appellee's cars were standing. Appellant went upon the switch behind one of the cars, and, in boyish fashion, was playing with the rubber tube which constitutes a part of the air brake system of the railroad. While he was thus engaged, and entirely concealed from view, an engine with cars attached thereto was pushed in on the switch and bumped against the cars behind which appellant was standing, with the result that he was knocked down and run over, suffering the injury complained of in his petition.

The infant appellant was a trespasser, and the agents and employees of the railroad company owed him no lookout duty whatever. All that they were required to do was to use reasonable diligence to prevent his injury after his danger was discovered. There is no pretense in this case that the engineer in charge of the train saw the appellant, or knew of his danger. The fact that there was another little boy standing up in one of the coal cars or gons, and one or two others standing near the track at the time the train pushed in, did not place the danger of appellant before the mind of the engineer in charge of the train. In the case of *Louisville & Nashville Railroad Co. v. Logsdon's Adm'r*, 118 Ky. 600, 81 S. W. 657, where a child considerably younger than appellant was run over and killed by the railroad, this court said: "A railroad company has the exclusive possession of its right of way, and stands just as the owner of any other premises so far as strangers coming upon it are concerned. At ordinary places along the track the presence of persons on the right of way is not to be anticipated, and therefore no lookout for them need be maintained. Every action for negligence rests on a breach of duty. If there has been no duty broken, there is no wrong, and there can be no recovery. An infant three years old, or an idiot, can no more recover than an adult unless there has been a breach of duty on the part of the defendant, and he can no more complain than an adult that a lookout was not kept at a place where the presence of persons was not to be anticipated. If infants were made an exception to the rule, and railroad companies were required to keep a lookout for them at all places along their track on account of their helplessness, the same principle would have to be applied to idiots, lunatics, epileptics, the deaf, the blind, and the like. This would destroy the rule, and make it inconsistent with itself for, if the presence of no persons is to be looked for on the track, the presence of persons infirm or unable to take care of themselves is not to be anticipated, and the defendant cannot be required to guard against a danger, which is not to be anticipated by a person of ordinary prudence." The same doctrine has been announced in several other cases. *Goodman's adm'r v. Louisville & Nashville Railroad Co.*, 77 S. W. 174, 25 Ky. Law Rep. 1086, 63 L. R. A. 657; *Louisville & Nashville Railroad Co. v. Redmon's Adm'r*, 91 S. W. 722, 28 Ky. Law Rep. 1293; *Louisville & Nash-*

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ville Railroad Co. *v.* Vittitoe's Adm'r, 41 S. W. 269, 19 Ky. Law Rep. 612; N. N., etc., Co. *v.* Deuser, 97 Ky. 92, 29 S. W. 973; Dorsey's Adm'r, *v.* Louisville & Nashville Railroad Co., 80 S. W. 1131, 26 Ky. Law Rep. 233. The fact that persons frequently cross the railroad for their own convenience near the place where the accident occurred did not make the appellant any the less a trespasser at the time he was injured. Brown's Adm'r, *v.* Louisville & Nashville Railroad Co., 97 Ky. 228, 30 S. W. 639; C. & O. Railway Co. *v.* Babour's Adm'r, 93 S. W. 24, 29 Ky. Law Rep. 339; Beiser *v.* C. & O. Railway Co., 92 S. W. 928, 20 Ky. Law Rep. 249.

The infant appellant being a trespasser, as said before, the employees of the railroad owed him no lookout duty, but were only required to guard against injuring him after his danger was discovered. It is not pretended in this case that any employee knew of appellant's danger before he was hurt. It follows, therefore, that the court properly awarded a peremptory instruction at the close of the testimony in favor of appellee.

Judgment affirmed.

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**WILLIAM ADAIR, Plff. in Err., v. UNITED STATES.**

(Argued October 29, 30, 1907. Decided January 27, 1908.)

[28 Sup. Ct. Rep. 277.]

**Constitutional Law—Due Process of Law—Liberty—Invalidity of Statute Forbidding Discharge of Employee because of Membership in Labor Organization.**—Personal liberty as well as the right of property are invaded without due process of law, in violation of U. S. Const., 5th Amend., by the provisions of the act of June 1, 1898 (30 Stat. at L. 424, chap. 370, U. S. Comp. Stat. 1901, p. 3205), § 10, making it a criminal offense against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of his membership in a labor organization.

**Interstate Commerce—Congressional Regulation—Forbidding Discharge of Employee because of Membership in Labor Organization.**—There is no such connection between interstate commerce and membership in a labor organization as to authorize Congress, by the act of June 1, 1898, § 10, to make it a crime against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of such membership on his part.

In error to the District Court of the United States for the Eastern District of Kentucky to review a conviction of an agent of an interstate carrier for discharging an employee from service to such carrier because of his membership in a labor organization. Reversed with directions to set aside the verdict and judgment of

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conviction, sustain the demurrer to the indictment, and dismiss the cause.

See same case below on demurrer, 152 Fed. 737.

The facts are stated in the opinion.

*Messrs Benjamin D. Warfield and Henry L. Stone* for plaintiff in error.

Attorney General *Bonaparte* and *Mr. William R. Harr* for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court:

This case involves the constitutionality of certain provisions of the act of Congress of June 1st, 1898 (30 Stat. at L. 424, chap. 370, U. S. Comp. Stat. 1901, p. 3205), concerning carriers engaged in interstate commerce and their employees.

By the 1st section of the act it is provided: "That the provisions of this act shall apply to any common carrier or carriers and their officers, agents, and employees, except masters of vessels and seamen, as defined in section 4612, Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3120), engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage. The term 'employees,' as used in this act, shall include all persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract: Provided, however, That this act shall not be held to apply to employees of street railroads, and shall apply only to employees engaged in railroad train service. In every such case the carrier shall be responsible for the acts and defaults of such employees in the same manner and to the same extent as if said cars were owned by it and said employees directly employed by it, and any provisions to the contrary of any such lease or other contract shall be binding only as between the parties thereto, and shall not affect the obligations of said carrier either to the public or to the private parties concerned."

The 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 9th sections relate to the settlement, by means of arbitration, of controversies concerning wages, hours of labor, or conditions of employment, arising between a carrier subject to the provisions of the act and its em-

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ployees, which seriously interrupt, or threaten to interrupt, the business of the carrier. Those sections prescribe the mode in which controversies may be brought under the cognizance of arbitrators, in what way the arbitrators may be designated, and the effect of their decisions. The first subdivision of § 3 contains a proviso "that no employee shall be compelled to render personal service without his consent."

The 11th section relates to the compensation and expenses of the arbitrators.

By the 12th section the act of Congress of October 1st, 1888 [25 Stat. at L. 501, chap. 1063], creating boards of arbitrators or commissioners for settling controversies and differences between railroad corporations and other common carriers engaged in interstate or territorial transportation of persons or property and their employees, was repealed.

The 10th section, upon which the present prosecution is based, is in these words:

"That any employers subject to the provisions of this act, and any officer, agent, or receiver of such employer, who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written, or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization; or who shall require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability or any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

It may be observed in passing that while that section makes it a crime against the United States to unjustly discriminate against an employee of an interstate carrier because of his being a member of a labor organization, it does not make it a crime to unjustly discriminate against an employee of the carrier because of his not being a member of such an organization.

The present indictment was in the district court of the United States for the Eastern district of Kentucky against the defendant, Adair.

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The first count alleged "that at and before the time hereinafter named the Louisville & Nashville Railroad Company is and was a railroad corporation, duly organized and existing by law, and a common carrier engaged in the transportation of passengers and property wholly by steam railroad for a continuous carriage and shipment from one state of the United States to another state of the United States of America; that is to say, from the state of Kentucky into the States of Ohio, Indiana, and Tennessee, and from the state of Ohio into the state of Kentucky, and was, at all times aforesaid, and at the time of the commission of the offense hereinafter named, a common carrier of interstate commerce, and an employer, subject to the provisions of a certain act of Congress of the United States of America, entitled, 'An Act Concerning Carriers Engaged in Interstate Commerce and Their Employees,' approved June 1st, 1898, and said corporation was not at any time a street railroad corporation. That before and at the time of the commission of the offense hereinafter named one William Adair was an agent and employee of said common carrier and employer, and was, at all said times, master mechanic of said common carrier and employer in the district aforesaid, and before and at the time hereinafter stated one O. B. Coppage was an employee of said common carrier and employer in the district aforesaid, and as such employee was, at all times hereinafter named, actually engaged in the capacity of locomotive fireman in train operation and train service for said common carrier and employer in the transportation of passengers and property aforesaid, and was an employee of said common carrier and employer actually engaged in said railroad transportation and train service aforesaid, to whom the provisions of said act applied, and at the time of the commission of the offense hereinafter named said O. B. Coppage was a member of a certain labor organization, known as the Order of Locomotive Firemen, as he, the said William Adair, then and there well knew; a more particular description of said organization and the members thereof is to the grand jurors unknown."

The specific charge in that count was "that said William Adair, agent and employee of said common carrier and employer, as aforesaid, in the district aforesaid, on and before the 15th day of October, 1906, did unlawfully and unjustly discriminate against said O. B. Coppage, employee, as aforesaid, by then and there discharging said O. B. Coppage from such employment of said common carrier and employer, because of his membership in said labor organization, and thereby did unjustly discriminate against an employee of a common carrier and employer engaged in interstate commerce because of his membership in a labor organization, contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the United States."

The second count repeated the general allegations of the first count as to the character of the business of the Louisville & Nashville Railroad Company and the relations between that corporation and Adair and Coppage. It charged "that said William Adair, in the district aforesaid, and within the jurisdiction of this



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court, agent and employee of said common carrier and employer aforesaid, on and before the 15th day of October, 1906, did unlawfully threaten said O. B. Coppage, employee as aforesaid, with loss of employment, because of his membership in said labor organization, contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the United States.”

The accused, Adair, demurred to the indictment as insufficient in law, but the demurrer was overruled. After reviewing the authorities, in an elaborate opinion, the court held the 10th section of the act of Congress to be constitutional. 152 Fed. 737. The defendant pleaded not guilty, and after trial a verdict was returned of guilty on the first count and a judgment rendered that he pay to the United States a fine of \$100. We shall, therefore, say nothing as to the second count of the indictment.

It thus appears that the criminal offense charged in the count of the indictment upon which the defendant was convicted was, in substance and effect, that, being an agent of a railroad company engaged in interstate commerce, and subject to the provisions of the above act of June 1st, 1898, he discharged one Coppage from its service because of his membership in a labor organization,—no other ground for such discharge being alleged.

May Congress make it a criminal offense against the United States—as, by the 10th section of the act of 1898, it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employee from service simply because of his membership in a labor organization?

This question is admittedly one of importance, and has been examined with care and deliberation. And the court has reached a conclusion which, in its judgment, is consistent with both the words and spirit of the Constitution, and is sustained as well by sound reason.

The first inquiry is whether the part of the 10th section of the act of 1898 upon which the first count of the indictment was based is repugnant to the 5th Amendment of the Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. This court has said that “in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the

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safety of the general public may demand.” *Jacobson v. Massachusetts*, 197 U. S. 11, 29, 49 L. ed. 643, 651, 25 Sup. Ct. Rep. 358, 362, and authorities there cited. Without stopping to consider what would have been the rights of the railroad company under the 5th Amendment, had it been indicated under the act of Congress, it is sufficient in this case to say that, as agent of the railroad company, and, as such, responsible for the conduct of the business of one of its departments, it was the defendant Adair’s right—and that right inhered in his personal liberty, was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him. Mr. Cooley, in his treatise on Torts, p. 278, well says: “It is a part of every man’s civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress.”

In *Lochner v. New York*, 198 U. S. 45, 53, 56, 49 L. ed. 937, 940, 941, 25 Sup. Ct. Rep. 539, 541, 543, which involved the validity of a state enactment prescribing certain maximum hours for labor in bakeries, and which made it a misdemeanor for an employer to require or permit an employee in such an establishment to work in excess of a given number of hours each day, the court said: “The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this Amendment, unless there are circumstances which exclude the right. There are, however, certain powers existing in the sovereignty of each state in the Union, somewhat vaguely termed ‘police powers,’ the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13;



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Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191.

\* \* \* In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor." Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation. The minority were of opinion that the business referred to in the New York statute was such as to require regulation, and that, as the statute was not shown plainly and palpably to have imposed an unreasonable restraint upon freedom of contract, it should be regarded by the courts as a valid exercise of the state's power to care for the health and safety of its people.

While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant, Adair,—however unwise such a course might have been,—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so,—however unwise such a course on his part might have been,—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. These views find support in adjudged cases, some

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of which are cited in the margin.<sup>†</sup> Of course, if the parties by contract fixed the period of service, and prescribed the conditions upon which the contract may be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action. And it may be—but upon that point we express no opinion—that, in the case of a labor contract between an employer engaged in interstate commerce and his employee, Congress could make it a crime for either party, without sufficient or just excuse or notice, to disregard the terms of such contract or to refuse to perform it. In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another. So far as this record discloses the facts the defendant, who seemed to have authority in the premises, did not agree to keep Coppage in service for any particular time, nor did Coppage agree to remain in such service a moment longer than he chose. The latter was at liberty to quit the service without assigning any reason for his leaving. And the defendant was at liberty, in his discretion, to discharge Coppage from service without giving any reason for so doing.

As the relations and the conduct of the parties towards each other was not controlled by any contract other than a general employment on one side to accept the services of the employee and a general agreement on the other side to render services to the employer,—no term being fixed for the continuance of the employment,—Congress could not, consistently with the 5th Amendment, make it a crime against the United States to discharge the employee because of his being a member of a labor organization.

But it is suggested that the authority to make it a crime for an agent or officer of an interstate carrier, having authority in the premises from his principal, to discharge an employee from service to such carrier, simply because of his membership in a labor

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<sup>†</sup>*People v. Marcus*, 185 N. Y. 257, 7 L. R. A. (N. S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073; *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L. R. A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Jacobs v. Cohen*, 183 N. Y. 207, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 53 Am. St. Rep. 443, 31 S. W. 781; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Gillespie v. People*, 188 Ill. 176, 52 L. R. A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; *Wallace v. Georgia, C. & N. R. Co.*, 94 Ga. 732, 22 S. E. 579; *Hundley v. Louisville & N. R. Co.*, 105 Ky. 162, 63 L. R. A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; *Brewster v. C. Miller's Sons Co.*, 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301; *New York, C. & St. L. R. Co. v. Schaffer*, 65 Ohio St. 414, 62 L. R. A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036; *Arthur v. Oakes*, 25 L. R. A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310.

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organization, can be referred to the power of Congress to regulate interstate commerce, without regard to any question of personal liberty or right of property arising under the 5th Amendment. This suggestion can have no bearing in the present discussion unless the statute, in the particular just stated, is, within the meaning of the Constitution, a regulation of commerce among the states. If it be not, then clearly the government cannot invoke the commerce clause of the Constitution as sustaining the indictment against Adair.

Let us inquire what is commerce, the power to regulate which is given to Congress?

This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have been given—that commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph,—indeed, every species of commercial intercourse among the several states,—but not that commerce “completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states.” The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed.<sup>†</sup> Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, and authorities there cited. In this connection we may refer to *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, relied on in argument, which case arose under the act of Congress of March 2d, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174.) That act required carriers engaged in interstate commerce to equip their cars used in such commerce with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes. But the act upon its face showed that its object was to promote the safety of employees and travelers upon railroads; and this court sustained its validity upon the ground that it manifestly had reference to interstate commerce, and was calculated to subserve the interests of such commerce by affording protection to employees and travelers. It was held that there

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<sup>†</sup>*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *Almy v. California*, 24 How. 169, 16 L. ed. 644; *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S. 1, 9, 12, 24 L. ed. 708, 710, 711; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 356, 30 L. ed. 1187, 1188, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 352, 47 L. ed. 492, 493, 23 Sup. Ct. Rep. 321; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Howard v. Illinois C. R. Co. (present term)*, 207 U. S. 463, ante, 141, 28 Sup. Ct. Rep. 141.

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was a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object. So, in regard to *Howard v. Illinois C. R. Co.* decided at the present term, 207 U. S. 463, ante, 141, 28 Sup. Ct. Rep. 141. In that case the court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in cases of personal injuries received by employees while actually engaged in such commerce. The decision on this point was placed on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would, therefore, be within the competency of Congress to establish for commerce among the states, but not as to commerce completely internal to a state. Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, in itself and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners,—an object entirely legitimate and to be commended rather than condemned. But surely those associations, as labor organizations, have nothing to do with interstate commerce, as such. One who engages in the service of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot, in law or sound reason, depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent because of his not being a member of such an organization. It is the employee as a man, and not as a member of a labor organization, who labors in the service of an interstate carrier. Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that, if it did not show more consideration for members of labor organizations than for wage-earners who were not members of such organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the states? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a co-ordinate department of

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the government. We could not do so without imputing to Congress the purpose to accord to one class of wage-earners privileges withheld from another class of wage-earners, engaged, it may be, in the same kind of labor and serving the same employer. Nor will we assume, in our consideration of this case, that members of labor organizations will, in any considerable numbers, resort to illegal methods for accomplishing any particular object they have in view.

Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to preceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ, in the conduct of its interstate business, only members of labor organizations, or only those who are not members of such organizations,—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as, in any just sense, a regulation of interstate commerce. We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 353, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321.

It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the 5th Amendment, and as not embraced by nor within the power of Congress to regulate interstate commerce but, under the guise of regulating interstate commerce, and as applied to this case, it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant, *Adair*.

We add that since the part of the act of 1898 upon which the first count of the indictment is based, and upon which alone the defendant was convicted, is severable from its other parts, and as what has been said is sufficient to dispose of the present case, we are not called upon to consider other and independent provisions of the act, such, for instance, as the provisions relating to arbitration. This decision is therefore restricted to the question of the validity of the particular provision in the act of Congress making it a crime against the United States for an agent or officer of an interstate carrier to discharge an employee from its service because of his being a member of a labor organization.

The judgment must be reversed, with directions to set aside



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the verdict and judgment of conviction, sustain the demurrer to the indictment, and dismiss the case.

It is so ordered.

MR. JUSTICE MOODY did not participate in the decision of this case.

MR. JUSTICE MCKENNA, dissenting:

The opinion of the court proceeds upon somewhat narrow lines and either omits or does not give adequate prominence to the considerations which, I think, are determinative of the questions in the case. The principle upon which the opinion is grounded is, as I understand it, that a labor organization has no legal or logical connection with interstate commerce, and that the fitness of an employee has no dependence or relation with his membership in such organization. It is hence concluded that to restrain his discharge merely on account of such membership is an invasion of the liberty of the carrier guaranteed by the 5th Amendment of the Constitution of the United States. The conclusion is irresistible if the propositions from which it is deducted may be viewed as abstractly as the opinion views them. May they be so viewed?

A summary of the act is necessary to understand § 10. Detach that section from the other provisions of the act and it might be open to condemnation.

The 1st section of the act designates the carriers to whom it shall apply. The 2d section makes it the duty of the chairman of the Interstate Commerce Commission and the Commissioner of Labor, in case of a dispute between carriers and their employees which threatens to interrupt the business of the carriers, to put themselves in communication with the parties to the controversy and use efforts to "mediation and conciliation." If the efforts fail, then § 3 provides for the appointment of a board of arbitration,—one to be named by the carrier, one by the labor organization to which the employees belong, and the two thus chosen shall select a third.

There is a provision that if the employees belong to different organizations they shall concur in the selection of the arbitrator. The board is to give hearings; power is vested in the board to summon witnesses, and provision is made for filing the award in the Clerk's office of the circuit court of the United States for the district where the controversy arose. Other sections complete the scheme of arbitration thus outlined, and make, as far as possible, the proceedings of the arbitrators judicial, and, pending them, put restrictions on the parties, and damages for violation of the restrictions.

Even from this meager outline may be perceived the justification and force of § 10. It prohibits discrimination by a carrier engaged in interstate commerce, in the employment under the circumstances hereafter mentioned, or the discharge from employment of members of labor organizations "because of such

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membership." This the opinion condemns. The actions prohibited, it is asserted, are part of the liberty of a carrier, protected by the Constitution of The United States from limitation or regulation. I may observe that the declaration is clear and unembarrassed by any material benefit to the carrier from its exercise. It may be exercised with reason or without reason, though the business of the carrier is of public concern. This, then, is the contention, and I bring its elements into bold relief to submit against them what I deem to be stronger considerations, based on the statute and sustained by authority.

I take for granted that the expressions of the opinion of the court, which seems to indicate that the provisions of § 10 are illegal because their violation is made criminal, are used only for description and incidental emphasis, and not as the essential ground of the objections to those provisions.

I may assume at the outset that the liberty guaranteed by the 5th Amendment is not a liberty free from all restraints and limitations, and this must be so or government could not be beneficially exercised in many cases. Therefore, in judging of any legislation which imposes restraints or limitations, the inquiry must be, What is their purpose, and is the purpose within one of the powers of government? Applying this principle immediately to the present case, without beating about in the abstract, the inquiry must be whether § 10 of the act of Congress has relation to the purpose which induced the act, and which it was enacted to accomplish, and whether such purpose is in aid of interstate commerce, and not a mere restriction upon the liberty of carriers to employ whom they please, or to have business relations with whom they please. In the inquiry there is necessarily involved a definition of interstate commerce and of what is a regulation of it. As to the first, I may concur with the opinion; as to the second, an immediate and guiding light is afforded by the case of *Howard v. Illinois C. R. Co.*, recently decided. 207 U. S. 463, ante, 141, 28 Sup. Ct. Rep. 141. In that case there was a searching scrutiny of the powers of Congress, and it was held to be competent to establish a new rule of liability of the carrier to his employees; in a word, competent to regulate the relation of master and servant,—a relation apparently remote from commerce, and one which was earnestly urged by the railroad to be remote from commerce. To the contention the court said: "But we may not test the power of Congress to regulate commerce solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce." In other words, that the power is not confined to a regulation of the mere movement of goods or persons.

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And there are other examples in our decisions—examples, too, of liberty of contract and liberty of forming business relations (made conspicuous as grounds of decision in the present case)—which were compelled to give way to the power of Congress. *Northern Securities Co. v. United States*, 193 U. S. 200, 48 L. ed. 679, 24 Sup. Ct. Rep. 436. In that case exactly the same definitions were made as made here and the same contentions were pressed as are pressed here. The Northern Securities Company was not a railroad company. Its corporate powers were limited to buying, selling, and holding stock, bonds, and other securities, and it was contended that, as such business was not commerce at all, it could not be within the power of Congress to regulate. The contention was not yielded to, though it had the support of members of this court. Asserting the application of the anti-trust act of 1890 [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200] to such business, and the power of Congress to regulate it, the court said “that a sound construction of the Constitution allows to Congress a large discretion ‘with respect to the means by which the powers it [the commerce clause] confers are to be carried into execution, which enables that body to perform the high duties assigned to it, in the manner most beneficial to the people.’” It was in recognition of this principle that it was declared in *United States v. Joint Traffic Asso.* 171 U. S. 571, 43 L. ed 288, 19 Sup. Ct. Rep. 25: “The prohibition of such contracts [contracts fixing rates] may, in the judgment of Congress, be one of the reasonable necessities for the proper regulation of commerce, and Congress is the judge of such necessity and propriety, unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief.” The contentions of the parties in the case invoked the declaration. There, as here, an opposition was asserted between the liberty of the railroads to contract with one another and the power of Congress to regulate commerce. That power was pronounced paramount, and it was not perceived, as it seems to be perceived now, that it was subordinate, and controlled by the provisions of the 5th Amendment. Nor was the relation of the power of Congress to that Amendment overlooked. It was commented upon and reconciled. And there is nothing whatever in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, or in *Lottery Case (Champion v. Ames)* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, which is to the contrary.

From these considerations we may pass to an inspection of the statute of which § 10 is a part, and inquire as to its purpose, and if the means which it employs has relation to that purpose and to interstate commerce. The provisions of the act are explicit and present a well co-ordinated plan for the settlement of disputes between carriers and their employees, by bringing the disputes to arbitration and accommodation, and thereby prevent strikes and the public disorder and derangement of business that may be consequent upon them. I submit no worthier purpose can engage legislative attention or be the object of legislative



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action, and, it might be urged, to attain which the congressional judgment of means should not be brought under a rigid limitation and condemned, if it contribute in any degree to the end, as a "gross perversion of the principle" of regulation, the condition which, it was said in *United States v. Joint Traffic Asso. supra*, might justify an appeal to the courts.

We are told that labor associations are to be commended. May not, then, Congress recognize their existence? yes, and recognize their power as conditions to be counted with in framing its legislation? Of what use would it be to attempt to bring bodies of men to agreement and compromise of controversies if you put out of view the influences which move them or the fellowship which binds them,—maybe controls and impels them, whether rightfully or wrongfully, to make the cause of one the cause of all? And this practical wisdom Congress observed,—observed, I may say, not in speculation or uncertain prevision of evils, but in experience of evils,—an experience which approached to the dimensions of a national calamity. The facts of history should not be overlooked nor the course of legislation. The act involved in the present case was preceded by one enacted in 1888 of similar purport. 25 Stat. at L. 501, chap. 1063. That act did not recognize labor associations, or distinguish between the members of such associations and the other employees of carriers. It failed in its purpose, whether from defect in its provisions or other cause we may only conjecture. At any rate, it did not avert the strike at Chicago in 1894. Investigation followed, and, as a result of it, the act of 1898 was finally passed. Presumably its provisions and remedy were addressed to the mischief which the act of 1888 failed to reach or avert. It was the judgment of Congress that the scheme of arbitration might be helped by engaging in it the labor associations. Those associations unified bodies of employees in every department of the carriers, and this unity could be an obstacle or an aid to arbitration. It was attempted to be made an aid; but how could it be made an aid if, pending the efforts of "mediation and conciliation" of the dispute, as provided in § 2 of the act, other provisions of the act may be arbitrarily disregarded, which are of concern to the members in the dispute? How can it be an aid, how can controversies which may seriously interrupt or threaten to interrupt the business of carriers (I paraphrase the words of the statute) be averted or composed if the carrier can bring on the conflict or prevent its amicable settlement by the exercise of mere whim and caprice? I say mere whim or caprice, for this is the liberty which is attempted to be vindicated as the constitutional right of the carriers. And it may be exercised in mere whim and caprice. If ability, the qualities of efficient and faithful workmanship, can be found outside of labor associations, surely they may be found inside of them. Liberty is an attractive theme, but the liberty which is exercised in sheer antipathy does not plead strongly for recognition.

There is no question here of the right of a carrier to mingle in his service "union" and "nonunion" men. If there were,

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broader considerations might exist. In such a right there would be no discrimination for the "union" and no discrimination against it. The efficiency of an employee would be its impulse and ground of exercise.

I need not stop to conjecture whether Congress could or would limit such right. It is certain that Congress has not done so by any provision of the act under consideration. Its letter, spirit, and purposes are decidedly the other way. It imposes, however, a restraint, which should be noticed. The carriers may not require an applicant for employment or an employee to agree not to become or remain a member of a labor organization. But this does not constrain the employment of anybody, be he what he may.

But it is said it cannot be supposed that labor organizations will, "by illegal or violent measures, interrupt or impair the freedom of commerce," and to so suppose would be disrespect to a co-ordinate branch of the government, and to impute to it a purpose "to accord to one class of wage-earners privileges withheld from another class of wage-earners, engaged, it may be, in the same kind of labor and serving the same employer." Neither the supposition nor the disrespect is necessary, and, it may be urged, they are no more invidious than to impute to Congress a careless or deliberate or purposeless violation of the constitutional rights of the carriers. Besides, the legislation is to be accounted for. It, by its letter, makes a difference between members of labor organizations and other employees of carriers. If it did not, it would not be here for review. What did Congress mean? Had it no purpose? Was it moved by no cause? Was its legislation mere wantonness and an aimless meddling with the commerce of the country? These questions may find their answers in *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

I have said that it is not necessary to suppose that labor organizations will violate the law, and it is not. Their power may be effectively exercised without violence or illegality, and it cannot be disrespect to Congress to let a committee of the Senate speak for it and tell the reason and purpose of its legislation. The committee on education, in its report, said of the bill: "The measure under consideration may properly be called a voluntary arbitration bill, having for its object the settlement of disputes between capital and labor, as far as the interstate transportation companies are concerned. The necessity for the bill arises from the calamitous results in the way of ill-considered strikes arising from the tyranny of capital or the unjust demands of labor organizations, whereby the business of the country is brought to a standstill and thousands of employees, with their helpless wives and children, are confronted with starvation." And, concluding the report, said: "It is our opinion that this bill, should it become a law, would reduce to a minimum labor strikes which affect interstate commerce, and we therefore recommend its passage."

With the report was submitted a letter from the secretary of the

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Interstate Commerce Commission, which expressed the judgment of that body, formed, I may presume, from experience of the factors in the problem. The letter said: "With the corporations as employers, on one side, and the organizations of railway employees, on the other, there will be a measure of equality of power and force which will surely bring about the essential requisites of friendly relation, respect, consideration, and forbearance." And again: "It has been shown before the labor commission of England that, where the associations are strong enough to command the respect of their employers, the relations between employer and employee seem most amicable. For there the employers have learned the practical convenience of treating with one thoroughly representative body instead of with isolated fragments of workmen; and the labor associations have learned the limitations of their powers."

It is urged by plaintiff in error that "there is a marked distinction between a power to regulate commerce and a power to regulate the affairs of an individual or corporation engaged in such commerce;" and how can it be, it is asked, a regulation of commerce to prevent a carrier from selecting his employees or constraining him to keep in his service those whose loyalty to him is "seriously impaired, if not destroyed, by their prior allegiance to their labor unions?" That the power of regulation extends to the persons engaged in interstate commerce is settled by decision. *Howard v. Illinois C. R. Co.*, 207 U. S. 463, ante, 141, 28 Sup. Ct. Rep. 141, and the cases cited in Mr. Justice Moody's dissenting opinion. The other proposition points to no evil or hazard of evil. Section 10 does not constrain the employment of incompetent workmen, and gives no encouragement or protection to the disloyalty of an employee or to deficiency in his work or duty. If guilty of either he may be instantly discharged without incurring any penalty under the statute.

Counsel also makes a great deal of the difference between direct and indirect effect upon interstate commerce, and assert that § 10 is an indirect regulation at best, and not within the power of Congress to enact. Many cases are cited, which, it is insisted, sustain the contention. I cannot take time to review the cases. I have already alluded to the contention, and it is enough to say that it gives too much isolation to § 10. The section is part of the means to secure and make effective the scheme of arbitration set forth in the statute. The contention, besides, is completely answered by *Howard v. Illinois C. R. Co. supra*. In that case, as we have seen, the power of Congress was exercised to establish a rule of liability of a carrier to his employees for personal injuries received in his service. It is manifest that the kind or extent of such liability is neither traffic nor intercourse, the transit of persons nor the carrying of things. Indeed, such liability may have wider application than to carriers. It may exist in a factory; it may exist on a farm; and, in both places, or in commerce, its direct influence might be hard to find or describe. And yet this court did not hesitate to pronounce it to be within the power of

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Congress to establish. "The primary object," it was said in *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, of the safety appliance act, "was to promote the public welfare by securing the safety of employees and travelers." The rule of liability for injuries is even more roundabout in its influence on commerce, and as much so as the prohibition of § 10. To contend otherwise seems to me to be an oversight of the proportion of things. A provision of law which will prevent, or tend to prevent, the stoppage of every wheel in every car of an entire railroad system, certainly has as direct influence on interstate commerce as the way in which one car may be coupled to another, or the rule of liability for personal injuries to an employee. It also seems to me to be an oversight of the proportions of things to contend that, in order to encourage a policy of arbitration between carriers and their employees which may prevent a disastrous interruption of commerce, the derangement of business, and even greater evils to the public welfare, Congress cannot restrain the discharge of an employee, and yet can, to enforce a policy of unrestrained competition between railroads, prohibit reasonable agreements between them as to the rates at which merchandise shall be carried. And mark the contrast of what is prohibited. In the one case the restraint, it may be, of a whim,—certainly of nothing that affects the ability of an employee to perform his duties; nothing, therefore, which is of any material interest to the carrier,—in the other case, a restraint of a carefully-considered policy which had as its motive great material interests and benefits to the railroads, and, in the opinion of many, to the public. May such action be restricted, must it give way to the public welfare, while the other, moved, it may be, by prejudice and antagonism, is intrenched impregnably in the 5th Amendment of the Constitution against regulation in the public interest?

I would not be misunderstood. I grant that there are rights which can have no material measure. There are rights which, when exercised in a private business, may not be disturbed or limited. With them we are not concerned. We are dealing with rights exercised in a quasi public business, and therefore subject to control in the interest of the public.

I think the judgment should be affirmed.

**MR. JUSTICE HOLMES, dissenting:**

I also think that the statute is constitutional, and, but for the decision of my brethren, I should have felt pretty clear about it.

As we all know, there are special labor unions of men engaged in the service of carriers. These unions exercise a direct influence upon the employment of labor in that business, upon the terms of such employment, and upon the business itself. Their very existence is directed specifically to the business, and their connection with it is, at least, as intimate and important as that of safety couplers, and, I should think, as the liability of master to servant,—matters which, it is admitted, Congress might regulate, so far as they concern commerce among the states. I suppose

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that it hardly would be denied that some of the relations of railroads with unions of railroad employees are closely enough connected with commerce to justify legislation by Congress. If so, legislation to prevent the exclusion of such unions from employment is sufficiently near.

The ground on which this particular law is held bad is not so much that it deals with matters remote from commerce among the states, as that it interferes with the paramount individual rights secured by the 5th Amendment. The section is, in substance, a very limited interference with freedom of contract, no more. It does not require the carriers to employ anyone. It does not forbid them to refuse to employ anyone, for any reason they deem good, even where the notion of choice of persons is a fiction and wholesome employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. I hardly can suppose that the grounds on which a contract lawfully may be made to end are less open to regulation than other terms. So I turn to the general question whether the employment can be regulated at all. I confess that I think that the right to make contracts at will that has been derived from the word "liberty" in the Amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint, the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ; I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind; but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.

ILLINOIS CENT. R. CO. *v.* LUCAS.

(Supreme Court of Mississippi, Jan. 21, 1907.)

[42 So. Rep. 607.]

**Railroads—Injuries to Third Persons—Liability of Lessor.**—A railroad company cannot excuse itself from liability by any contract which it may enter into with a lessee, where damage is done by the lessee's negligence in the management and conduct of the railroad and its affairs.

**Same—Licensees—Injuries—Railroad's Liability.\***—Plaintiff, having leased certain grounds to a circus, went to the railroad station, while the circus train was being unloaded, to transact business between herself and the circus manager, without any reference to the railroad company or any of its employees, who had no knowledge of plaintiff's presence about the station. Plaintiff went to a part of the station not intended for passengers, and while there was injured by the negligence of the circus people while unloading the circus train. Held, that plaintiff was at most a mere licensee, and the railroad company, having been guilty of no willful wrong with reference to her, was not liable for her injuries.

Appeal from Circuit Court, Attala County; J. T. Dunn, Judge.

Action by Lulu Lucas against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Action for damages for personal injuries sustained by appellee while standing on the platform of the freight depot of appellant. The proof showed that appellee went to the depot to see the manager of the Wallace Circus on a matter of business, the agent of the circus having previously leased the land of appellee for the exhibition; and on being directed by an employee of the circus to go to the platform in search of the manager, and while she was standing on the platform watching the unloading of the circus cars by the employees of the circus, she was injured by one of the wagons which was being unloaded. There is no proof that appellee was on the platform on the invitation or with the knowledge of any agent or employee of the railroad company, or that she had any business to transact with the railroad company, or that her injuries were the result of any negligence of any employee

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\*For the authorities in this series on the subject of the care due licensees and trespassers, on railroad premises, see foot-notes appended to *Croft v. Chicago, etc., Ry. Co.* (Iowa), 21 R. R. R. 583, 44 Am. & Eng. R. Cas., N. S., 583; foot-notes appended to *Hickey v. Rio Grande W. Ry. Co.* (Utah), 20 R. R. R. 318, 43 Am. & Eng. R. Cas., N. S., 318; foot-notes appended to *Chattanooga Southern R. Co. v. Wheeler* (Ga.), 19 R. R. R. 561, 42 Am. & Eng. R. Cas., N. S., 561; foot-notes appended to *Colorado & S. Ry. Co. v. Sonne* (Colo.), 18 R. R. R. 727, 41 Am. & Eng. R. Cas., N. S., 727.



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of the railroad company. The theory of the appellant was that appellee was a mere licensee, and that appellant owed her no other duty than to refrain from doing her a willful or malicious injury, and on this ground asked a peremptory instruction, which was refused. The jury returned a verdict for \$1,999, and the railroad company appeals.

*Mayes & Longstreet*, for appellant.

*S. L. Dodd and Alexander & Alexander*, for appellee.

MAYES, J. The only assignment of error which we deem it necessary to notice is that which brings into review the action of the circuit judge in refusing the peremptory instruction asked for appellant in the trial of the cause in the court below. There can be no dispute as to the proposition contended for by appellee that the railroad company cannot excuse itself from liability by any contract which it may enter into with a lessee, where damage is done by the negligence of the lessee in the management and conduct of the railroad and its affairs. But this rule of law has no application to this case. The damage done Mrs. Lucas was not caused by the negligence or the mismanagement of the railroad and its affairs, either by itself or by any attempted lessee. The damage suffered by Mrs. Lucas was inflicted by the agents, servants, or employees of the circus company, engaged alone in performing a service for the circus company which was peculiarly its own business. They were not employees, agents, or servants of the railroad company, nor were they engaged in any way in the management, control, or operation of the railroad, at the time the injury was inflicted. The railroad company had nothing to do with the business which took Mrs. Lucas to the depot. The business which took her there was a purely private business between herself and the circus people. She had gone to a place not intended for passengers, and where there was no necessity for her to be in so far as she had any business with the railroad company or the circus. The railroad company was in no way connected with her business at the depot, and none of its representatives were shown to have any knowledge of it. The injury was not occasioned by any act or omission on the part of any agent, servant, or employee of the railroad company, nor by the failure on the part of the railroad company to discharge every duty that it owed to her. She went to the depot in safety, she proceeded upon the platform in perfect safety, the damage is not shown to have been occasioned by the operations of the trains in any way, and in fact at the time the damage occurred, so far as the testimony shows, it seems that the cars of the circus company were standing without motion on the track of the railroad company. The most that can be said of Mrs. Lucas' relation to the railroad company is that she was a mere licensee. The railroad company was under no obligation to her except to do her no willful wrong; and, since there was no duty or obligation resting upon the railroad company to her, there could have been no negligence or



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breach of duty on their part towards her. The railroad company had not assumed to unload the cars for the circus. They were under no duty to act for the circus in this, and having provided a safe approach for Mrs. Lucas, and she having been injured by the act of the agents, servants, and employees of the circus company alone, there can be no responsibility on the part of the railroad company for this injury.

If liability existed anywhere, it is on the part of the circus company, and not the railroad company. If a merchant receive a car load of freight, and the railroad company transport it to its destination and place it upon a side track for the purpose of being unloaded, and the merchant should send his agents, servants, or employees to the depot for the purpose of unloading this car, and they should negligently injure a party, it certainly would not be contended that the party so injured by the negligent act of the servant or employee of the merchant could hold the railroad company liable. The railroad company was under no duty to unload these cars, and in unloading the cars the agents, servants, and employees of the circus company were in no way acting for the railroad company, and it cannot be held liable. A railroad company is not liable for every injury which may be sustained on its property. It is only liable in cases where the injury occurs by some negligent act of an agent, employee, or servant of the railroad company, or in the case where it has failed in some duty which it owes as a railroad to the public. It is not required that a railroad company shall guaranty that shippers over its road, in unloading their freight, will handle it in such a way as to produce no injury to any one; and if a shipper, in unloading freight which has been consigned to him, through the negligence of his servants, agents, or employees, injures a party, it is his own liability, and not that of the railroad company.

Let the case be reversed and remanded.

LOUISVILLE & N. R. Co. *v.* WILSON.

(Court of Appeals of Kentucky, March 6, 1907.)

[100 S. W. Rep. 302.]

**Railroads—Accidents at Crossings—Gates.\***—Where a railway maintains a watchman and gates at a crossing, and fails to keep the same down or give proper warning when trains are passing, it is liable to a person injured thereby who is not guilty of contributory negligence.

**Same—Pleading and Proof—Variance.**—A party cannot recover for injuries alleged to have been received at a crossing if it is shown that he was not injured while passing over the crossing, but while alighting from a freight train.

**Same—Contributory Negligence.**—A party cannot recover for injuries received at a crossing if guilty of contributory negligence.

**Same—Failure to Look and Listen—Gates—Watchman.†**—The failure to look and listen for a train at a street crossing is not per se negligence, where the railroad company keeps a watchman and gates at the crossing and the gates are up.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

“To be officially reported.”

Action by Carl Wilson against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*Helm & Helm, Benjamin D. Warfield, and H. L. Stone, for appellant.*

*Jacob Solinger and D. W. Baird, for appellee.*

HABSON, J. The tracks of the Louisville & Nashville Railroad Company leading from the south into Louisville cross diagonally Seventh street at and a little north of its intersection with Magnolia avenue. There are gates maintained by the company on both sides of the crossing. Seventh street at this point is a much traveled city highway; perhaps the most traveled highway leading into the city from the country. On the 11th of November, 1905, about 6 P. M. Carl Wilson, then 18 years of age, who lived south of the crossing, went up seventh street, past the crossing, about 100 yards, to a boot-black stand where he had his shoes shined, intending to go to a party. He then returned along Seventh street until he reached the gate at

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\*See foot-note appended to *Montgomery v. Missouri Pac. Ry. Co.* (Mo.), 11 R. R. R. 274, 34 Am. & Eng. R. Cas., N. S., 274.

†See foot-notes appended to *Messenger v. Pennsylvania R. Co.* (Pa.), 21 R. R. R. 86, 44 Am. & Eng. R. Cas., N. S., 86; foot-notes appended to *Briggs v. Boston & M. R. R.* (Mass.), 19 R. R. R. 508, 42 Am. & Eng. R. Cas., N. S., 508.

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the crossing, where he found a freight train passing and the gates down. There are three tracks at this point. The freight train was passing on the east track. As soon as the freight passed the gates were raised, and he started across, passing close to the rear end of the freight which was going south. Just as he reached the next track he was struck by a north-bound passenger train on that track moving rapidly. He was not aware of the coming of the passenger train, and apparently did not know what had struck him. His arm was so broken by the collision as to require amputation near the shoulder, and he sustained a serious injury to his head as well as bruises on his body. He brought this suit to recover damages. The case was tried in the circuit court, resulting in a verdict and judgment for him for \$2,250, and the railroad company appeals.

The above is a statement of the facts as shown by the proof for the plaintiff; three or four persons in the vicinity testifying that the accident occurred as related above. On the other hand, the proof for the railroad company is that the gates were not raised, that there was no freight train going south on the track, and that Wilson swung off of a freight train passing along the west track and was struck by the passenger train on the other track just after he reached the ground.

The court, among other things, instructed the jury as follows:

“(1) The court instructs the jury that it was the duty of the defendant, Louisville & Nashville Railroad Company, at the intersection of its tracks with Seventh and Magnolia streets to lower the gates which it maintained at said intersection on the approach of a train, so as to give to those attempting to use the crossing a reasonable opportunity to avoid injury from the train, and, if the jury believe from the evidence that at the time and place complained of by the plaintiff, Carl Wilson, the defendant negligently failed to discharge this duty, and that the plaintiff was injured thereby while attempting to cross said intersection, and that the plaintiff was not at said time and place himself guilty of contributory negligence, but for which he would not have been injured, then the law is for the plaintiff, and the jury shall so find.

“(2) If the jury believe from the evidence that the defendant discharged the duty incumbent upon it as laid down in instruction 1, or if they believe from the evidence that the plaintiff was not injured while attempting to cross over the intersection, or if they believe from the evidence that the plaintiff was himself guilty of contributory negligence, but for which he would not have been injured, then the law is for the defendant, and the jury shall so find.”

“(4) By the term ‘contributory negligence,’ as used in these instructions, is meant a failure on the part of the plaintiff to use ordinary care for his own protection and safety, under the facts and circumstances in evidence preceding and attending his injury; and in this connection the court instructs the jury that, if they believe from the evidence that the gates were raised or were

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up at the time the plaintiff entered upon the intersection for the purpose of crossing it, then this circumstance was an invitation on the part of the defendant to the plaintiff and the public to cross, and an assurance that the track could be crossed in safety, and the plaintiff cannot be found guilty of contributory negligence in attempting to make the said crossing unless the jury believe from the evidence that he failed to use ordinary care for his own safety and protection under these circumstances; but, if the jury believe that the gates were raised or were up at the said time and the plaintiff did fail under the circumstances to use ordinary care, or if the jury believe that the plaintiff entered upon said crossing while the gates were down or were being lowered, then the law is for the defendant and the jury should so find, notwithstanding the jury may believe that the defendant was also guilty of negligence at the same time and place.

“(5) If you believe from the evidence that the plaintiff, Carl Wilson, jumped upon or boarded the freight train of the defendant without the defendant’s consent, and while alighting from such train the plaintiff, Carl Wilson, was injured, then the law is for the defendant, and you shall so find.”

As the proof was clear that Wilson, if he jumped upon or boarded the freight train, did so without the defendant’s consent, the fifth instruction was in effect a peremptory instruction to the jury to find for the defendant if he received his injuries while alighting from that train. The same idea is conveyed in so much of instruction 2 as told the jury they should find for the defendant if the plaintiff was not injured while attempting to cross over the intersection; so that the verdict of the jury is a finding that he was injured while crossing over the intersection in the manner related by him.

The finding for the plaintiff under instructions 1 and 2 is in substance a finding that the gates at the crossing had been raised as an invitation to persons on the street to pass over the intersection, and that he was injured while attempting to do so and exercising ordinary care for his own safety under the circumstances. It is complained that the court told the jury in effect that Wilson had a right to rely upon the raising of the gates as an invitation on the part of the defendant to cross. Wilson testified that, when the gates were raised, he did not stop, look, or listen for the train, but, assuming that it was safe, went upon the crossing, and it is insisted that the court in lieu of instruction No. 1 should have (given the jury this instruction: “It was the duty of defendant to exercise care to notify persons using said street of the approach of a train or trains to said crossing by lowering the railroad gates, or by other notice or signal reasonably calculated to warn persons using said street or avenue of the approach of a train or trains to said intersection. The plaintiff, Carl Wilson, had the right to cross the railroad tracks on Seventh street or Magnolia avenue, but it was his, the said Carl Wilson’s duty to exercise care and prudence to discover for himself the approach

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of trains, and care and caution to keep out of danger." The passenger train was ringing its bell as it approached the crossing, but the freight train perhaps prevented Wilson from hearing the bell or seeing the passenger train, and so the question is presented whether the raising of the gates at the crossing of a city highway may be relied on by the traveler as an invitation to pass over the crossing.

In *Dick v. L. & N. R. R. Co.*, 64 S. W. 725, 23 Ky. Law Rep. 1068, where the plaintiff had been injured on a street crossing similar to this when the gates were up, the circuit court had given a peremptory instruction to find for the defendant, but this was reversed on appeal. The court said: "The court cannot say as matter of law that because she failed to look and listen for the approaching train before she went on to the track she was guilty of contributory negligence, in view of the fact that appellee was required and did keep a watchman and gates across the street at that crossing, and that it was his duty to let down the gates on the approach of trains. If the gates were up, as appellant's proof tends to show, it might reasonably be concluded by the traveler that there was no danger in crossing. As to whether there was negligence in failing to look for a train when the gates are up is a question that cannot be said as a matter of law to be entirely settled in the affirmative. Different persons, judging from the conduct of the ordinarily prudent person, might differ as to whether this was negligence. In our opinion the peremptory instruction was error." In *Sights v. L. & N. R. R. Co.*, 117 Ky. 436, 78 S. W. 172, the court quoted with approval the following: "And, when gates or a flagman have been maintained by railroad companies at the crossing of streets in cities and towns, the public have a right, when the gates are open, or the flagman not, in his accustomed place of duty, to presume, in the absence of knowledge to the contrary, that the gateman or flagman is properly discharging his duties; and it is not negligence on their part to act on the presumption that they will not be exposed to a danger which could only arise from the disregard of his duties; and it is negligence for a gatekeeper or flagman to leave his post, knowing that an engine is approaching a crossing without giving some signal of danger." On the second appeal of that case (see *L. & N. R. R. Co. v. Sights*, 89 S. W. 132) the court approved an instruction substantially in the language above quoted. In this case the gatekeeper was not absent. He was at his post, and raised the gate. The obvious purpose in raising the gate was to take the gate out of the way of the people so that they could pass over. The raising of the gate was necessarily an invitation to the public to use the crossing, and, as has been well said, it can make no difference that a gatekeeper expresses that the road is safe by opening the gate or by word or gesture. The railroad company is required to maintain the gates for the better security of the public, and they would be not only a mockery, but actually misleading if the raising of the gates when they are down is not an invitation for the public to pass. See *Northern Central Railroad*

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Co. v. State (Md.) 60 Atl. 19; Stegner v. Chicago, etc., R. R. Co. (Minn.) 102 N. W. 205, and cases cited.

The court did not tell the jury that the raising of the gates would relieve Wilson of the obligation to use ordinary care for his own safety. He only told them that the raising of the gates was an invitation on the part of the defendant to the plaintiff to cross, and he still left it for them to determine whether, in view of this invitation, Wilson exercised ordinary care for his own safety under the circumstances. The instructions of the court conform to the rule heretofore laid down by this court and fairly submitted the case to the jury.

Judgment affirmed.

**HIGH v. SOUTHERN PAC. CO.**

(Supreme Court of Oregon, March 5, 1907.)

[88 Pac. Rep. 961.]

**Railroads—Killing Animals—Fences—Depot Grounds—Question for Jury.\***—In an action against a railroad company for killing plaintiff's animals that strayed on defendant's right of way, evidence held to require submission to the jury of the question whether the point where the animals strayed on the right of way was within defendant's depot grounds, where it was not required to fence its track.

**Same—Issues—Variance.**—In an action against a railroad for killing plaintiff's animals, an allegation of a failure to fence defendant's track was not supported by proof that a gate in a fence actually constructed was negligently left open.

**Pleading—Separate Causes of Action—Remedy.**—If two causes of action are stated in a complaint, defendant's remedy is by motion for an order to require them to be separately stated, if they could be properly joined, otherwise to require plaintiff to elect on which he would rely, and not by a motion to strike out.

Appeal from Circuit Court, Marion County; John B. Cleland, Judge.

Action by M. M. High against the Southern Pacific Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

This is an action to recover damages for animals killed by a moving train. The defendant operates a railroad from Portland to San Francisco, and has a right of way 60 feet wide through the grounds of the United States Indian Training School at Chemawa, upon which it maintains a depot or station for receiving and discharging freight and passengers. Chemawa is

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\*For the authorities in this series on the subject of the applicability of statutes requiring railroads to fence their tracks, with respect to localities, see foot-notes appended to *Bird v. Michigan Cent. R. Co.* (Mich.), 21 R. R. R. 622, 44 Am. & Eng. R. Cas., N. S., 622.



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not an incorporated town, city or village, platted into lots and blocks, and there are no streets or alleys crossing the railway at that place. About 1,100 feet north of the depot a county road from the east crosses the track and right of way at right angles, and then turns north, running parallel with, and a short distance west of, the right of way for about 600 feet, when it again turns west. The defendant company originally maintained fences on both sides of the right of way north from the county road with gates therein at a farm crossing opposite where the county road turns to the west. A short time prior to the killing of the plaintiff's animals it extended its side track north, to within 20 or 30 feet of the farm crossing referred to, and removed the fence along the west side to that point, with a view of arranging for the receipt and discharge of freight north of the county road crossing. It did not, however, remove the fence on the east, but continued to maintain it as before, and the evidence tends to show that on the 9th of September, 1904, the animals of the plaintiff which were being pastured in an inclosure made by such fence escaped through the gate at the farm crossing, and were killed by a moving train. The defendant had at the time from 50 to 75 employees living in box cars on a temporary siding near the gate through which it is alleged the animals escaped. These men had a tent, bake oven, etc., inside the inclosure, and used the gate for the purpose of passing in and out, and there was evidence tending to show that the gate was carelessly and negligently left open by them, and the animals thus allowed to escape. The complaint alleges that it was the duty of the defendant, under the statute, to fence its road at the point where the animals escaped, but that it had previously removed the fence on the west to extend its depot grounds; that the taking down of the fence and the extending of the depot grounds were wholly unnecessary to the safe or convenient transaction of its business with the public, and was for its own private advantage; that no freight or passenger business whatever was transacted at or near the gate; and that defendant, in disregard of its duty to keep its track fenced at such point, failed and neglected to construct and maintain a fence on the west side thereof, or to maintain a gate to complete the farm crossing or keep closed the gate put in by it on the east side of such crossing, and permitted its servants, agents, and employees to leave such gate open, by reason of which the horses escaped and were killed. The defendant moved to strike out that part of the complaint alleging negligence in leaving the gate open, but the motion was overruled, and the defendant answered, denying the negligence charged in the complaint, and alleging that the point where the animals entered upon the track was within its depot grounds and a place it was not required to fence. The court below directed a nonsuit, and plaintiff appeals.

*A. M. Cannon*, for appellant.

*Geo. G. Bingham* and *R. A. Leiter*, for respondent.

BEAN, C. J.. (after stating the facts). It is unnecessary to no-



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tice the evidence at length. It is sufficient that it tended to show that the animals escaped through the gate at the farm crossing, which it is claimed was carelessly and negligently left open by the employees of the defendant. The court below, following the line of authorities which holds that in actions of this character the extent of depot grounds is a question of law for the court, and not of fact for the jury, ruled that the gate referred to was within the depot grounds, and as a consequence defendant was not required under the statute to maintain a fence at such point. Since the trial in the court below we have had occasion to examine the question thus presented, and the rule announced is that, where the evidence as to whether a given point constitutes a part of the depot grounds of a railway company in conflicting or different inferences may be drawn from it, the question is for the jury, and not for the court. *Wilmot v. Oregon R. & N. Co.* (Or.) 87 Pac. 528.

Now, we think it cannot be said in this case that the evidence was so clear and undisputed that the court could declare as a matter of law that the place where the animals entered upon the track was within the depot grounds of the defendant. The gate through which it is alleged they escaped was about 1,700 feet north of the place where it received and discharged passengers and freight, and was north of a cattle guard put in by the defendant, probably as the northmost limit of its depot grounds, and there was evidence tending to show that it was not necessary for the convenience of either the company or the public that the right of way should be unfenced at that point. There was no evidence that the company contemplated using the east side of its track north of the county road crossing for the transaction of business with the public, or, indeed, that the track could be approached from that side except along the right of way. The link put in by it subsequent to the accident, and which is designed to be used in the shipment of freight, is 400 or 500 feet south of the farm crossing, and the evidence is at least conflicting as to whether it was either necessary or convenient for the public or the company that the track should remain unfenced at the point where the gate is located. And, moreover, the defendant built and was maintaining the fence and gate as a part of the inclosure in which plaintiff's animals were being pastured, and this was evidence tending to show that the defendant did not consider such place a part of its depot grounds.

The defendant claims that, if it was required to maintain a fence on the east side of its track at the place where the gate is located, it had actually done so, and therefore discharged any duty devolving upon it in that regard, and that the action is based upon the statutory liability for a failure to maintain a fence, and therefore plaintiff cannot recover, even if it was negligent in allowing the gate to remain open. An allegation of a failure to fence is not supported by proof that a gate in a fence actually constructed was negligently left open. *Stonebraker v. Chicago & Alton R. Co.*, 110 Mo. App. 497, 85 S. W. 631; *Megrue et al. v.*

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Lenox, 59 Ohio St. 479, 52 N. E. 1022. But, as we understand the complaint, the gravamen of the action is negligence in leaving the gate open and thus allowing the animals to escape from the inclosure and wander onto the track. The averment that it was the duty of the defendant to fence its track at the point where the animals escaped was matter of inducement and preliminary to the charge of negligence referred to. If there were, in fact, two causes of action stated in the complaint, the defendant should have moved for an order requiring them to be separately stated, if they could be properly joined, and, if not, to require plaintiff to elect upon which he would rely. The remedy was not by motion to strike out. The complaint, we think, clearly contains a cause of action for negligence in leaving the gate open, and, if it was at a point where defendant was required to fence and its being open was due to the negligence of the defendant, it is liable. 3 Wood, Railroads (Minor's Ed.) § 419; 3 Elliott, Railroads, § 1200; *Moore v. Northern Pacific Ry. Co.*, 80 Minn. 24, 82 N. W. 1085; *Chapman v. New York Central*, 33 N. Y. 369, 88 Am. Dec. 392; *Spinner v. New York Central*, 67 N. Y. 153.

Judgment reversed, and new trial ordered.

ILLINOIS CENT. R. CO. *v.* DAVIDSON.

(Supreme Court of Illinois, Feb. 21, 1907.)

[80 N. E. Rep. 250.]

**Railroads—Fencing Tracks—Statutes—Construction.\***—The railroad fencing act (3 Starr & C. Ann. St. 1896, p. 3253, c. 114, § 68), requiring every railroad to fence its road, except at crossings of public roads, and to maintain cattle guards at all road crossings, requires a railroad, where it is expressly or impliedly exempt from fencing its road, to maintain cattle guards connected with wing fences, and a railroad, not being required to fence its right of way where the right of way of another road crosses it, must construct cattle guards and wing fences without reference to whether the other road maintains fences and cattle guards or not.

Appeal from Appellate Court, Third District.

Action by George W. Davidson against the Illinois Central Railroad Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

*Shutt, Graham & Graham* (John G. Dernan, of counsel), for appellant.

*Robert H. Patton*, for appellee.

VICKERS, J. Appellee brought this suit against the Illinois Central Railroad Company to recover damages to eight horses and one mule, and attorney's fees, under the railroad fencing act of

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\*See foot-note appended to preceding case.

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this state, caused by the engine and cars of the railroad company. The facts are undisputed, and the sole question for our determination is whether the railroad company is liable for the injuries under section 68 of chapter 114. 3 Starr & C. Ann. St. 1896, p. 3253. There is a grade crossing of the Illinois Central Railroad and the Pawnee Railroad at Pawnee Junction, Ill., at right angles. The fences of the two roads join, so as to inclose the crossing. Neither road has constructed wing fences or cattle guards, so as to prevent animals that might get upon the crossing from wandering along the right of way of either railroad. Appellee's horses got onto the right of way of the Pawnee Railroad through a defect in the fence about a quarter of a mile east of the crossing of the two roads. They passed down west to the crossing, turned south on the Illinois Central Railroad right of way, and traveled about a mile. Here they encountered a cattle guard and turned north on the Illinois Central, and were struck and injured by one of appellant's trains about three-quarters of a mile south of the crossing. The judgment below was for \$1,375 as the value of the animals and \$150 attorney's fee. The judgment has been affirmed by the Appellate Court for the Third District, and the Illinois Central Railroad Company has prosecuted this further appeal.

The circuit court refused to direct a verdict for appellant, and also refused general instructions based upon the theory that appellant was not required to construct wing fences and cattle guards at the crossing described. Exceptions to these rulings of the court were preserved, and the errors assigned thereon present the only question involved.

The section of the statute upon which appellee relies for recovery reads as follows: "That every railroad corporation shall, within six months after any part of its line is open for use, erect and thereafter maintain fences on both sides of its road or so much thereof as is open for use, suitable and sufficient to prevent cattle, horses, sheep, hogs or other stock from getting on such railroad, except at the crossings of public roads and highways, and within such portion of cities and incorporated towns and villages as are or may be hereafter laid out and platted into lots and blocks, with gates or bars at the farm crossings of such railroad, which farm crossings shall be constructed by such corporations when and where the same day may become necessary, for the use of the proprietors of the lands adjoining such railroad; and shall also construct, where the same has not already been done, and thereafter maintain at all road crossings now existing or hereafter established, cattle-guards, suitable and sufficient to prevent cattle, horses, sheep, hogs and other stock from getting on such railroad; and when such fences or cattle-guards are not made as aforesaid, or when such fences or cattle-guards are not kept in good repair, such railroad corporations shall be liable for all damages which may be done by the agents, engines or cars of such corporation, to such cattle, horses, sheep, hogs or other stock thereon, and reasonable attorney's fees, in any court wherein suit is brought for such damages, or to which the same may be appealed; but where such fences and

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guards have been duly made and kept in good repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done." Whether or not appellant is required by the foregoing statute to construct and maintain cattle guards and wing fences at the crossing in question is a question of law (*Illinois Central Railroad Co. v. Whalen*, 42 Ill. 396), and it must be determined from a construction of the statute in question. The object sought to be accomplished by the enactment of this statute was to prevent injury to domestic animals and to protect employees and the traveling public from the danger resulting from the obstruction of railroad tracks. *Terre Haute & Indianapolis Railway Co. v. Williams*, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44. The statute should receive a liberal construction in furtherance of its objects. Public roads and highways and platted portions of cities, towns, and villages are expressly excepted from the general purview of the statute in question, and by construction it has been held that other places where public convenience forbids fencing were also excepted as being within the spirit and intent of the statute. *Chicago & Eastern Illinois Railroad Co. v. Guertin*, 115 Ill. 466, 4 N. E. 507; *Chicago, Burlington & Quincy Railroad Co. v. Hans*, 111 Ill. 114. It has also been settled that where the railroad is exempt, either expressly or by necessary implication, from fencing certain portions of its road, cattle guards, connected with wing fences, must be placed at the terminus of the exempt portions, to prevent animals from going to portions of the right of way required to be fenced. *Atchison, Topeka & Santa Fe Railroad Co. v. Elder*, 149 Ill. 173, 36 N. E. 565; *Toledo, St Louis & Kansas City Railroad Co. v. Franklin*, 159 Ill. 99, 42 N. E. 319. In *Elliott on Railroads*, vol. 3, § 1198, the rule is laid down as follows: "The general rule is that, wherever a railroad company is under obligation to fence its tracks, it is bound to maintain cattle guards at the boundary line between the fenced and unfenced parts of its track." Clearly, there is an implied exemption from the duty to fence the right of way at a grade crossing of one railroad over another, and yet, unless a railroad is included in the words "public roads and highways," it is not expressly excepted by the language of the statute, but it would be so absurd and impracticable to give the statute a construction requiring one railroad to build a fence across the track of another that we have no hesitation in holding that such railroad crossing is excepted, whether it be included in the words "public roads and highways" or not. There is here, therefore, an exception, and appellant was not required to fence its right of way across the Pawnee Railroad right of way; and this brings us to the precise and only frictional question in the case: whether appellant was required to construct cattle guards and wing fences so as to prevent domestic animals from getting upon its right of way of the Pawnee Railroad Company.

Appellant contends, with much force and reason, that a distinction exists between this crossing and other places where railroads are not required to fence, in that as to all other such places where public convenience requires the road to be left open

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the public have a right to use such open places, and that domestic animals may be rightfully there and may stray upon the railroad unless prevented by wing fences and cattle guards; while, as to the crossing in question, the public have no right to use said crossing except to cross over it on the cars of one or the other of the railroads, and that in no event can domestic animals get upon said crossing without passing over the line fence of one of the railroads. In other words, the contention seems to be that, since the duty to fence, under the law, is binding upon both companies, appellant ought not to be held liable for a failure to construct and maintain wing fences and cattle guards, the only necessity for which would result from the failure of the intersecting railroad to comply with the statute requiring it to erect and maintain suitable fences on both sides of its right of way. The duty imposed on appellant by the law cannot be made to depend upon the observance or nonobservance of the legal duty resting upon another. It may be true that the neglect of the Pawnee Railroad Company to keep its fences in repair made it possible for the animals in question to get upon appellant's right of way; but it is also true that, if the appellant had constructed sufficient wing fences and cattle guards on each side of the space it was not required to fence at this crossing, the animals could not have strayed to the place where they were struck. The duty to fence and to construct cattle guards is absolute, and it is no defense that another railroad company owing the same duty has neglected to perform it. *Marengo v. Great Northern Railway Co.*, 84 Minn. 397, 87 N. W. 1117, 27 Am. St. Rep. 369. The law is well settled that the fact that animals were running at large in violation of the statute is no defense to an action for injury to such animals based on a violation of the statute. *Ewing v. Chicago & Alton Railroad Co.*, 72 Ill. 25; *Cairo & St. Louis Railroad Co. v. Woosley*, 85 Ill. 370. If the unlawful act of the owner which makes the injury possible is not available as a defense, it would seem that the unlawful act of a third party could not exempt appellant from liability.

While no adjudicated case involving the exact question here presented has been cited by counsel or found by us in this or any other state, it seems to us more consonant with reason and the true intent and spirit of the statute to hold that, wherever there is an express or implied exception to the statute requiring railroads to fence their rights of way, the duty to inclose the fenced portion of the right of way by the construction and maintenance of suitable and sufficient wing fences and cattle guards arises where the duty to fence ends, and that the failure of appellant herein to comply with the statute as thus construed renders it liable. There was consequently no error in refusing to direct a verdict, and in refusing the instructions offered by appellant, based upon a contrary construction of its duty under the statute.

The judgment of the Appellate Court for the Third District is affirmed.

Judgment affirmed.

**BLACK v. BESSEMER & L. E. R. Co.**

(Supreme Court of Pennsylvania, Jan. 7, 1907.)

[65 Atl. Rep. 405.]

**Railroads—Accident at Crossing—Signals.\***—A railroad company is not absolutely bound to signal as a train approaches an overhead crossing.

**Same.**—Where a traveler has a clear view of a railroad for 1,500 feet while approaching an overhead crossing, the railroad company is under no duty to signal the approach of the train.

**Same.**—Where, in an action for injuries at a crossing, there is no evidence of negligence on the part of defendant, plaintiff cannot recover, though he be not guilty of contributory negligence.

Appeal from Court of Common Pleas, Mercer County.

Action by Joseph Black against the Bessemer & Lake Erie Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

At the trial it appeared that on December 2, 1903, plaintiff's wife, and her father, Anson Curry, were driving in a one-horse buggy on a public road which crossed under the defendant's railroad. As they approached the crossing they had a clear view of the railroad for a distance of nearly 1,500 feet in the direction from which a train was coming. When under or near the crossing the horse took fright, and Mrs. Black was thrown out, and received injuries from which she died a few days afterwards. There was no evidence that a signal was given by the blowing of a whistle or the ringing of a bell. Defendant presented these points: "(1) The court is requested to instruct the jury that the evidence in this case shows so clearly and conclusively that a locomotive on the railroad at any point between the crossing and a distance, say 1,000 feet, west of the crossing, was plainly visible from every part of the public road from the opening of the crossing for 300 feet or more back in the direction from which Mr. Curry and Mrs. Black were driving, there can be no doubt of the ability of the two occupants of the buggy to have seen the locomotive if they had looked, and therefore there can be no recovery in this case. Answer: Refused. (2) That, under all the evidence in this case, there can be no recovery. Answer: Refused."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

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\*See foot-notes appended to *Garvick v. United Rys. & Elec. Co.* (Md.), 20 R. R. R. 615, 43 Am. & Eng. R. Cas., N. S., 615; foot-notes appended to *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168; foot-note appended to *Carpenter v. Chicago, etc., Ry. Co.* (Iowa), 15 R. R. R. 466, 38 Am. & Eng. R. Cas., N. S., 466.



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*Q. A. Gordon and Templeton, Orr & Whiteman*, for appellant.  
*S. S. Mehard and W. J. Whieldon*, for appellee.

ELKIN, J. The negligence complained of in the statement of claim is that the engine was "running at a very high rate of speed and making great and frightful noises," and that notice of the approach of the train to the crossing was not given "by the ringing of the engine bell or the blowing of the whistle." The testimony produced at the trial failed to show that the engine was running at a high or unusual rate of speed, or that the train was making "great and frightful noises," nor were any facts proven that would warrant a submission of this question to the jury. This feature of the case was not pressed in the court below, and is not insisted on here. The testimony showed that the train was running at from 15 to 18 miles an hour, a very moderate rate of speed, so that we may safely dismiss this allegation from further consideration. The whole case of appellee is based on the allegation that no bell was rung nor was any whistle blown at a proper place before the train reached the crossing. Whether these signals were given was a disputed question of fact at the trial, but it must be conceded, if it is held to have been the duty of appellant to give them, there was sufficient testimony to submit to the jury in order to determine the fact. Was it the duty of appellant to ring a bell or blow a whistle as the train approached the crossing? The rule is settled that such duty is imposed on railroad companies at grade crossings. Does the same rule apply to overhead crossings? If so, the judgment entered in the court below should be affirmed; if not, there can be no recovery under the facts of this case. The rule as applied to grade crossings was based upon a humane public policy intended as a protection to the lives, limbs, and property of travelers, not only on the highways, but on the railroads as well. The dangers of crossing at grade were great, and the standard of care required to avoid these dangers was correspondingly great. In order to avoid, as far as possible, the dangers of collision in such cases, the courts have established the rule not to permit a grade crossing unless the physical conditions are such as to leave no alternative by the construction of an overhead or underground crossing. The railroad companies by the expenditure of vast sums of money are rapidly abolishing them, and in this laudable work should be encouraged. When, therefore, the risks and dangers of crossing at grade have been avoided by the construction of an overhead crossing, it would be unreasonable to make an imperative unbending rule requiring the performance of duties demanded as a protection where the danger is greater. In *P. W. & B. Railroad Co. v. Stinger*, 78 Pa. 219, it was held that failure to ring a bell or blow a whistle in approaching a grade crossing was negligence per se. This is the settled rule of our cases. In our opinion, however, no such imperative duty is required at overhead crossings because in such cases the dangers are not so great and the object of giving the signal is different. At a grade crossing the object of requiring the signals to be given

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is to avoid a collision, while at an overhead crossing the only purpose to be served by blowing a whistle is to give notice to travelers on the highway so that they may keep out of the zone of danger.

The learned counsel for appellee relies on *Penna. Railroad Company v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346, as ruling this question in his favor. It was held in that case that wherever danger may result to persons rightfully traveling on a public which crosses the tracks of a railroad, whether at grade, or over or under the same, it is the duty of the railroad company to give notice of the approach of its trains by proper signals. That case, however, must be understood in the light of its own facts. The cause of the accident there was not a failure to blow the whistle before reaching the crossing, but whistling as the train went under the bridge whilst a traveler was passing over it, by means of which his horse was frightened, ran off, and injured him. The testimony showed that the accident was caused by blowing the whistle as the train passed under the bridge, and this was sufficient to submit to the jury to determine the question of the defendant's negligence without any reference to the allegation that the alarm signals were not given before the train reached the crossing. It is apparent that the question of the failure to give these signals in that case was introduced, not for the purpose of showing such negligence on the part of the defendant as would warrant a recovery, but to excuse the alleged contributory negligence of the plaintiff in not stopping his team before going over the bridge and waiting until the train had passed. On the east side of the public road, the direction from which the train was coming, there was a hill which obstructed the view for a distance of 74 rods from the railroad to within 6 rods of it, so that the traveler could not see the approaching train during all that distance, nor until within a few rods of the tracks. For this reason and under the circumstances of that case, the trial judge charged the jury in determining under all the facts whether the company was guilty of negligence, they should take into consideration the relative position of the public road and the railroad at or near the crossing; the likelihood and facility of a traveler to discover an approaching train; and further, taking into consideration the fact that trains approaching from the east would not be seen from a point at a safe distance from the bridge, whether it was the duty of the engineer to give notice of the approach of the train so as to put the traveler on his guard. Even in that case it seemed to be conceded that, if the traveler could have seen the train at a safe distance from the crossing, there was no imperative duty resting on the railroad company to give him notice. We doubt if that case would have been affirmed if the only negligence proven was the failure to give notice of the approach of the train, but this fact, under all the circumstances of that case, and, the additional and material fact, the blowing of the whistle under the bridge while the horse was passing over it, were submitted to the jury to determine whether the defendant had been guilty of such negligence as to make it liable in damages.

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In the present case the same rule might be applicable if, in point of fact, the horse had been frightened by blowing a whistle as the train passed over the crossing, but this important fact does not appear. Again, it must be observed that as Curry approached the crossing, driving his horse, he had a clear view of the railroad for a distance of nearly 1,500 feet in the direction from which the train was coming. He could see for himself whether a train was in view, and did not need to rely on danger signals to give him notice of the fact. It was as much his duty to keep a lookout for the train as it was for the appellant to give notice of its approach even at a grade crossing. At an overhead crossing the purpose of blowing a whistle is to give the traveler notice of the approach of the train in order that he may avoid danger, but, if he had within himself, by his own sense of sight, with an unobstructed view, the opportunity to observe, and failed to do so, appellant ought not to be convicted of negligence in failing to do for him what he failed to do for himself. It would be a strange rule to convict appellant of negligence for failure to give notice, and at the same time excuse the appellee from his duty to take notice when both parties had equal opportunities for observing the situation, and both were required to exercise reasonable care under the circumstances.

The case was presented in the court below and has been argued here almost entirely on the question of contributory negligence. In this connection it should be observed that the first and primary question to be considered in every such case is the negligence of the defendant. The contributory negligence of the plaintiff is predicated upon and presupposes the negligence of the defendant. If the testimony does not disclose negligence on the part of the defendant, there can be no recovery, no matter how free from negligence the facts show the plaintiff to be. *Hanna v. Phila & Reading Railway Co.*, 213 Pa. 157, 62 Atl. 643. In the present case the facts proven at the trial did not show any such negligence as would make the appellant liable in damages for the injuries sustained, and it is the duty of the court to say there can be no recovery.

Judgment of the court below reversed, and is here entered for appellant.

CLINEBELL *v.* CHICAGO, B. & Q. R. Co.

(Supreme Court of Nebraska, Nov. 22, 1906.)

[110 N. W. Rep. 347.]

**Railroads—Frightening Horses.\***—A railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road. *Hendricks v. F. E. & M. V. R. Co.*, 93 N. W. 141, 67 Neb. 120, followed and approved.

**Same—Evidence.**—Evidence examined, and held insufficient to sustain the judgment of the trial court.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Appeal from District Court, Custer County; Hostetler, Judge.

Action by Nancy E. Clinebell against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

*J. W. Deweese and F. E. Bishop*, for appellant.

*N. T. Gadd, R. G. Moore, and J. H. Broady*, for appellee.

OLDHAM, C. This was an action for personal injuries, and is here for a second review by this court. At the first hearing a judgment in favor of the plaintiff was reversed, because plaintiff's petition failed to allege any negligent act on the part of the defendant which was the proximate cause of the injuries. The opinion is reported in 5 Neb. (Unof.) 603, 99 N. W. 839. After the reversal of the judgment an amended petition was filed and issues joined, and on a trial to the court and jury plaintiff again secured a verdict and judgment, from which the defendant appeals.

The only alleged error called to our attention in the brief of the appellant which it will be necessary to consider is as to the sufficiency of the testimony to support the judgment. There is no serious dispute as to the manner in which plaintiff's injuries were received. It appears that she was driving home with a gentle team in an open top buggy along a highway which for some distance near the place of the accident runs nearly parallel

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\*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to frightening teams and saddle horses, see foot-notes appended to *Louisville & N. R. Co. v. Sights* (Ky.) 21 R. R. R. 856, 44 Am. & Eng. R. Cas., N. S., 856; *Alabama Great Southern R. Co. v. Fulton* (Ala.), 20 R. R. R. 311, 43 Am. & Eng. R. Cas., N. S., 311; *Foster v. East Jordan Lumber Co.* (Mich.), 21 R. R. R. 282, 43 Am. & Eng. R. Cas., N. S., 282; foot-notes appended to *Dulin v. Metropolitan St. Ry. Co.* (Kan.), 19 R. R. R. 844, 42 Am. & Eng. R. Cas., N. S., 844; foot-notes appended to *Southern Indiana Ry. Co. v. Norman* (Ind.), 19 R. R. R. 545, 42 Am. & Eng. R. Cas., N. S., 545; *Choctaw, etc., R. Co. v. Coker* (Ark.), 19 R. R. R. 159, 42 Am. & Eng. R. Cas., N. S., 159.

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to defendant's right of way. The general direction of the public highway is east and west, and the defendant's right of way crosses it at the place of the accident, running in a southeasterly direction. West of the crossing there is a cut about 300 feet long and about 7 feet deep. At the crossing the railroad embankment is about 12 feet high, with an approach leveled back about 37 feet, by which the wagon road crosses the track at right angles. Before reaching this approach the road follows as depression or gully north of the railroad and comes up an incline to the level of the embankment. Just as plaintiff had driven to the top of the incline to turn in on the approach to the crossing, a freight train came out from the mouth of the cut, and probably caused plaintiff's team to shy and frighten plaintiff, so that she jumped, or fell, from the buggy and received the injuries complained of.

Plaintiff's account of the accident is rather incoherent, probably because she was dazed from fright, as appears from the following extract from the record: "Q. State to the jury what happened. A. Well, I was driving along, and I was careful. I was careful and looking. I didn't think of the train, or nothing, coming, for I couldn't see. It was my view right towards home to see a train; but I didn't see any. I supposed maybe it had gone down. I didn't know, and I drove along there; didn't hear any sound or nothing, and I drove up on the crossing, pretty near to the crossing, and the first thing I knew the horses threw their ears up, pricked their ears up, and that's all I know. I don't know how I got out or nothing. \* \* \* Q. What happened afterwards, if you know? Where did you go? A. Well, when I come to myself the train was done gone. I discovered—I got up the best I can. I don't know how, but I was frightened. When I got up I saw my fingers was cut there and here (indicating), and I hobbled up, and I discovered the box was loose from the buggy, and I didn't know what to do, anyway. I don't know how I got around, but I got around some way; and when I went to get the horses around and went to fasten up the tugs I was all this nervous. I didn't see any hurt, but I was bloody here, and I was just so nervous I couldn't fasten the tugs at all; but I got them fastened and I discovered the footsteps to get into the buggy, and I done threw my foot up on them, and I got into the buggy and the team started off with me. When I got on the track everything was turned blind. I was turned blind. I couldn't see. I squatted right down in the buggy, and the team took me home. That is all I know about that." She also testified that she did not hear either the bell or the whistle before seeing the train.

It was further established that when she got home she was in a dazed, partially unconscious condition, and bore evidence of severe and painful injuries from her fall. Numerous witnesses, at various distances ranging from a quarter to a half a mile from the railroad, testified that they heard neither the bell nor the whistle when the train passed the crossing. The only witnesses, other than the plaintiff, who saw the accident, were two brake-

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men on defendant's train. The brakeman near the front end of the train testified that he saw the horses turn slightly away from the track when the train approached, and saw plaintiff jump from the buggy. The brakeman who was on the caboose testified that, when his car passed the team, plaintiff was standing by the horses and apparently holding them. All the employees in charge of defendant's train testify positively that the whistle was sounded at the whistling post 200 feet west of the crossing, and that the bell was rung continuously while passing through the cut and over the highway.

The only negligent act relied upon by plaintiff as the proximate cause of the injury was the defendant's failure to ring the bell and blow the whistle on approaching the crossing; it being contended that, if these signals had been given, plaintiff would have heard them, and would have remained down in the gully until the train had passed, and would thus have escaped the accident. While the failure to give these signals on approaching a public crossing constitutes statutory negligence, yet, unless such negligence is shown to be the proximate cause of the injuries complained of, proof of this fact alone is not sufficient to show a right of recovery. Even though we were willing to concede that the negative testimony of plaintiff's witnesses, as against the positive declarations of the persons in charge of the train, is sufficient to sustain the finding of the jury that the statutory signals were not given at the crossing, we are still unable to see how, without entering on the domain of remote speculation, we could conclude that such failure was the proximate cause of the plaintiff's injury. The contention that plaintiff would not have driven up onto the approach of the crossing if she had heard the statutory signals is purely conjectural, and unsupported by any testimony contained in the record. To our minds, the only logical conclusion that can be deduced from the facts surrounding the accident is that the proximate cause of the injury was the fright, either of plaintiff or her team, at the ordinary operation of a passing train. In the recent case of *Hendricks v. F. E. & M. V. R. R. Co.*, 67 Neb. 120, 93 N. W. 141, it was held that "a railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road."

We therefore conclude that the evidence is insufficient to sustain the judgment, and we recommend that the judgment of the district court be reversed, and the cause remanded for further proceedings.

AMES and APPERSON, concur.



CENTRAL OF GEORGIA RY. CO. *v.* HUGHES.

(Supreme Court of Georgia, Feb. 15, 1907.)

[56 S. E. Rep. 770.]

**Railroads—Killing Stock—Evidence.\***—It being a material matter of inquiry as to what was the condition of the headlight of the locomotive of the defendant's train at the time it was alleged to have struck and killed the plaintiff's horse, to recover the value of which this suit was brought, evidence tending to show the condition of the light at a point four or five miles distant from the place at which the animal was killed was not entirely irrelevant.

**Same—Instructions.†**—There being evidence to authorize the jury to find that the plaintiff's horse was killed by the running of the defendants locomotives and train as alleged, it was not error for the court to charge the jury as follows: "If the defendant does show by the testimony in the case that they have exercised all ordinary and reasonable care and diligence, and notwithstanding the exercise of that ordinary care and diligence, ordinary, and reasonable care and diligence, they did not and could not have avoided the injury, then, although the plaintiff's horse was killed by the company, the plaintiff would not be entitled to recover."

**Trial—Instructions.**—This being a suit for the recovery of damages, and the evidence upon the question of the amount that the jury should find for the plaintiff, in the event their verdict was in his favor, not being such as to limit them absolutely to any one given sum, it was the duty of the court to charge the jury the law as to the measure of damages; and his failure to do so was error.

**Appeal—Review.**—Except as above ruled, no other reversible error is shown to have been committed in the trial.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Action by J. H. Hughes against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

*Hall & Wimberly*, for plaintiff in error.

*Joseph H. Hall and Warren Roberts*, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

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\*See extensive note, 19 R. R. R. 275, 42 Am. & Eng. R. Cas., N. S., 275.

†For the authorities in this series on the question of the sufficiency of evidence to rebut the presumption of negligence arising from the fact of injury to live stock from collision with a railroad train, see foot-notes appended to *Atlanta & W. P. R. Co. v. Hudson* (Ga.), 18 R. R. R. 490, 41 Am. & Eng. R. Cas., N. S., 490.

SOUTHERN RY. CO. *v.* STOCKDON.

(Supreme Court of Appeals of Virginia, March 14, 1907.)

[56 S. E. Rep. 713.]

**Railroads—Accidents at Crossings—Actions for Injuries—Pleading.**

—In an action for injuries received at a railway crossing where a watchman was kept, allegations of the complaint which aver that plaintiff drove upon the track without looking, when he might have done so, do not show affirmatively that he was guilty of contributory negligence, and were not bad on demurrer.

**Same—Ordinance Violated—Unconstitutionality.**—Where a count of a complaint in an action for injuries received at a railway crossing states a good cause of action in other respects, a demurrer will not be sustained to it, on the ground that the speed ordinance alleged to have been violated by the defendant, was unconstitutional.

**Same.**—Where a count of a complaint in an action for injuries at a crossing states a good cause of action, a demurrer to it will not be sustained on the ground that it does not allege that the violation of a certain ordinance by the defendant, if valid, was the proximate cause of plaintiff's injury.

**Same—Admissibility of Evidence.**—In an action against a railway company for injuries received at a crossing in a town, where it was shown by defendant's time-table that it knew of the ordinance of the town regulating the speed within its limits, it was not error to admit the ordinance in evidence, even though by law it was only open for inspection to the voters of the town.

**Trial—Order of Proof—Discretion of Court.**—In an action against a railway for injuries at a crossing, where the violation of a speed ordinance was one of the grounds relied on to show the negligence of the company, it was not error to admit the ordinance in evidence, even if no foundation had been laid for its introduction, since the order of introducing evidence is in the discretion of the trial court.

**Damages—Personal Injuries—Evidence—Earning Capacity.**—In an action for personal injuries, the court properly allowed the plaintiff to testify that several years ago he earned \$40 a month as a wheelwright, and that he was earning more at the time of the accident, selling machinery upon commission, though he was unable to state the precise amount, since this was evidence tending to show his earning capacity at the time of the injury.

**Railroads—Accident at Crossing—Action for Injuries—Questions for Jury.**—In an action against a railway for injuries received at a crossing where a watchman was stationed, the question of whether the watchman gave proper warning of the approach of the train was for the jury, even though the preponderance of the evidence was to the effect that he did give warning.

**Same—Instructions—Negligence of Defendant.**—An instruction in an action against a railway for injuries received at a crossing charged

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the jury that the running of the train at a greater rate of speed than was allowed by the ordinance of the town in itself was not negligence which would render defendant liable. Held, that this instruction was not contradicted by one which told the jury that, in determining whether the defendant was negligent, they could consider the fact, if it was a fact, that the defendant's train was running at a greater rate of speed than was allowed by the ordinance of the town, along with the other facts of the case.

**Same—Contributory Negligence.**—An instruction, in an action against a railway for injuries received at a crossing within the limits of a town, charged that plaintiff in approaching the crossing had the right to assume that the defendant would obey the speed ordinance of the town, and, if they believed that the train was running at a greater rate of speed than allowed by the ordinance, they might consider the fact, along with the other circumstances of the case, in determining whether plaintiff was guilty of contributory negligence. Held, that this instruction was not in conflict with one which charged the jury that the running of the train at a greater rate of speed than was allowed by the ordinance of the town in itself was not negligence which would render defendant liable.

**Same—Rate of Speed—Violation of Statutes or Ordinances.\***—A traveler approaching a railway crossing in a town has a right to assume that the railway company will obey the speed ordinance of the town, whether he sees or hears the train or not, unless his sight or hearing inform him that the company is running its train in violation of the ordinance.

**Same—Contributory Negligence—Question for Jury.**—In an action for injuries received at a railway crossing where a watchman was stationed, the preponderance of the evidence was that the watchman warned the plaintiff in time of the approaching train; yet there was evidence that the warning was given too late. The evidence as to the care exercised by plaintiff in looking and listening as much as possible before going upon the track was also in dispute. Held, that the question of plaintiff's contributory negligence was for the jury.

**Same—Instructions.**—In an action for injuries received at a railway crossing where a watchman was stationed, defendant asked an instruction that it was plaintiff's duty to approach the crossing at such a gait that he could stop if warned of an approaching train. The instruction, as amended and given, told the jury that the plaintiff should have approached the crossing at such a gait that he could stop if warned in time of an approaching train, and, if he did not do so, he could not recover. Held not error to refuse to give the instruction as offered, and in giving it as amended, since the instruction is

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\*For the authorities in this series on the question whether a person about to attempt to cross railroad tracks has the right to presume that cars or trains will not approach at an unlawful speed, see foot-notes appended to *Eckhard v. St. Louis Transit Co. (Mo.)*, 21 R. R. R. 831, 44 Am. & Eng. R. Cas., N. S., 831; *Schmidt v. Missouri Pac. Ry. Co. (Mo.)*, 21 R. R. R. 806, 44 Am. & Eng. R. Cas., N. S., 806.

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asked ignored the fact that a watchman was kept at the crossing to give warning of approaching trains.

**Trial—Refusal of Requests—Instructions Already Given.**—In an action for injuries received at a railway crossing, refusal to instruct that plaintiff could not recover if his negligence contributed to the accident, even if the defendant was negligent, was not error, where this issue was covered by a given instruction that, if the plaintiff's negligence contributed to any extent to his injury, he could not recover.

Appeal from Circuit Court, Orange County.

Action by H. W. Stockdon against the Southern Railway Company. Judgment for plaintiff, and defendant appealed. Affirmed.

The following is a copy of the complaint:

"Henry W. Stockdon, plaintiff, complains of the Southern Railway Company, a corporation, defendant, of a plea of trespass on the case, for this, to wit, that heretofore, to wit, at the time of and before the commission of grievances hereinafter set forth, the said defendant was and has hitherto continued to be a common carrier of passengers and freight, and in and about its said business was using and occupying, and has hitherto continued to use and occupy, a certain line of railroad track, a part of which then extended, and still extends, through the town of Orange, a municipal corporation, in the county of Orange, in the state of Virginia, and over and through the streets of the said town; that upon its said railroad track, a part of which was placed and laid through the town of Orange as aforesaid, the defendant in and about its said business, at that time used and ran, and has, hitherto, continued to use and run, certain trains of cars drawn by locomotive engines belonging to it. Plaintiff alleges that Main street—a public street of said town—in said town, crosses, and then did cross, said defendant's railroad track nearly at right angles, running nearly east and west, and that any person approaching, by way of said street, said crossing from the east side thereof, cannot, and could not then, see a train approaching on defendant's track from the north until he reaches said defendant's railroad track; the view of said person toward the north being obstructed.

"And said plaintiff avers that it then was, and still is, the duty of the defendant in the management, conduct, control, and running of its trains of cars drawn by its locomotive engines as aforesaid to use due and reasonable care and precaution to avoid running its trains of cars drawn by its locomotive engines, as aforesaid, against or upon, and to avoid colliding with, any person upon, or approaching, its said crossing.

"And the plaintiff avers that heretofore, to wit, on the 10th day of December, 1903, he, the said plaintiff, upon and by way of said Main street, approached the said crossing from the east side thereof, in his buggy drawn by one horse, and then and there exercising due care, being in said buggy drawn as aforesaid, en-

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tered upon said crossing, using due care in approaching and entering upon same.

“And the plaintiff avers that the defendant did not do and perform its duty in using due and reasonable care and precaution in the management, conduct, control, and running of its trains of cars, drawn by its locomotive engines as aforesaid, to avoid running its trains of cars, drawn by its locomotive engines as aforesaid, against and upon, and to avoid colliding with, plaintiff, as he, using due care, approached and entered upon said crossing, but, on the contrary, defendant did, at the said time and place, so negligently, carelessly, and wrongfully manage, conduct, control, and run one of its said trains of cars, south-bound, known, plaintiff believes, as train ‘No. 29,’ drawn by one of its locomotive engines as aforesaid, that the said train of cars, drawn by its locomotive engine as aforesaid, ran against and upon, and collided with, plaintiff, at the time and place aforesaid, whereby, and in consequence of which negligent, careless, and wrongful acts and conduct of defendant, plaintiff was struck, run against, and collided with by said train of cars, drawn by its locomotive engine as aforesaid, and was thereby seriously and permanently injured and disabled, and thereby so became, and was, and has since so continued to be; and thereby suffered and underwent, and has since said time suffered and undergone, and still continues to suffer and undergo, great physical and mental pain and agony, and thereby was, and is now, prevented from attending to and transacting his lawful business and affairs, and thereby has been compelled to lay out and expend a large sum of money in endeavoring to get healed and cured, and thereby his said buggy was demolished and destroyed.

“And for this, to wit, that heretofore, to wit, at the time of and before the commission of the grievances hereinafter set forth, the said defendant was, and has hitherto continued to be, a common carrier of passengers and freight, and in and about its said business was using and occupying, and has hitherto continued to use and occupy, a certain line of railroad, a part of which then extended and still extends through the town of Orange, a municipal corporation, in the county of Orange, in the state of Virginia, and over and through the said streets in the said town; that upon its said railroad track, a part of which was, and is, placed and laid through the town of Orange as aforesaid, the defendant, in and about its said business, then used and ran and has hitherto continued to use and run, certain trains of cars, drawn by locomotive engines belonging to it. Plaintiff alleges that Main street, public street in said town, crosses and then did cross said defendant’s railroad track nearly at right angles, running nearly east and west, and that any person approaching, by way of said street, said crossing from the east side thereof, cannot, and could not then, see a train approaching upon defendant’s track from the north until he reaches said

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defendant's railroad track; the view of said person, toward the north, being obstructed.

"And plaintiff avers that there was at the time of the commission of the grievances herein set forth, and has continued hitherto to be, a legal and valid ordinance of, and in, the said town of Orange, prohibiting trains from running through said town at a greater rate of speed than six miles an hour, and that it was at the said time, and has hitherto continued to be, the duty of defendant not to run, or allow to be run, its trains through the said town at a greater rate of speed than six miles an hour, in such manner as to unreasonably endanger persons using said crossing.

"And the plaintiff avers that heretofore, to wit, on the 16th day of December, 1903, he, the said plaintiff, upon and by way of said Main street approached the said crossing from the east side thereof, in his buggy drawn by one horse, and then and there exercising due care, being in said buggy drawn as aforesaid, entered upon said crossing, using due care in approaching and entering upon the same.

"And the plaintiff avers that the defendant did not do and perform its duty in not running, or allowing to be run, its trains through the said town at a greater rate of speed than six miles an hour, in such manner as to endanger, unreasonably, persons using said crossing; but, on the contrary, did utterly disregard its said duty, and did, at the time and place aforesaid, negligently, carelessly, and wrongfully run, or allow to be run, one of its said trains of cars, drawn by one of its locomotive engines as aforesaid, south-bound, known, plaintiff believes, as train 'No. 29,' at a great and unlawful rate of speed, to wit, at the rate of 25 miles an hour, and in such negligent, careless, and wrongful manner as to so unreasonably endanger plaintiff that, when he, using due care in approaching on and by way of said street and entering upon said crossing, he was run against and struck by the locomotive engine drawing said train of cars, whereby he was seriously and permanently injured and disabled, and has hitherto continued so to be, and thereby suffered and underwent, and has hitherto continued to suffer and undergo, and still continues to suffer and undergo, great mental and physical pain and agony; and thereby was, has hitherto continued to be, and still is, unable to attend to and transact his lawful business and affairs, and thereby has been compelled to pay, lay out, and expend a large sum of money in endeavoring to get cured and healed of his injuries inflicted upon him as aforesaid; and thereby his buggy was demolished and destroyed.

"And for this, to wit, heretofore, to wit, at the time of and before, the commission of the grievances hereinafter set forth, the defendant was and has hitherto continued to be, and still is, a common carrier of passengers and freight, and in and about its said business was using and occupying, and has hitherto continued to use and occupy, a certain line of railroad, a part of which then extended, and still extends, through the town of



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Orange, a municipal corporation, in the county of Orange, state of Virginia, and over and through the streets of said town; that upon its said railroad track, a part of which was and is placed and laid through the town of Orange as aforesaid, the defendant in and about its said business, at that time used and ran, and has hitherto continued to use and run, certain trains of cars drawn by locomotive engines belonging to it.

"Plaintiff alleges that Main street, a public street of said town, in the said town, crosses, and then did cross, said defendant's railroad track nearly at right angles thereto, said street running nearly east and west, and that a person approaching and crossing said railroad track from the east side thereof cannot, and could not then, see a train approaching the said crossing from the north upon defendant's track; the view of the person so approaching being obstructed by buildings, and other things, some of which obstructions were placed there by defendant. Plaintiff alleges that said crossing, owing to said obstructions and the noise of traveling vehicles and other noises thereabouts, was then, and is now, dangerous, and that defendant, in recognition of this fact, then, as now, employs a watchman to stand at said crossing to give the public timely warning of approaching trains, and that plaintiff had notice of this fact (that the said watchman was so employed) and had the right to rely thereon.

"And plaintiff says it was the duty of defendant, through its said watchman, to notify, and give him timely warning, when approaching said crossing from the east side thereof, of any danger from trains approaching over defendant's track from the north, especially trains approaching at a great and unlawful rate of speed.

"Plaintiff allege that on December 16, 1903, there was, and still is, a legal and valid ordinance of and in the town of Orange aforesaid prohibiting trains from being run through said town at a greater rate of speed than at the rate of six miles an hour. Plaintiff alleges that on said 16th day of December, 1903, he, using due care, approached said crossing from the east side thereof, by way of said Main street, in a buggy drawn by one horse, using due care in so approaching said crossing; that at said time and place said plaintiff could not and did not hear the approach of said defendant's train, owing to the noise made by a wagon just in front of plaintiff, and other noises.

"Plaintiff avers that said watchman, in utter disregard of his duty, did not give him timely warning when approaching said crossing, but utterly failed to do so. Plaintiff avers that he drove upon said crossing, using due care in so doing, and was there struck, and run upon and against by defendant's south-bound passenger train, drawn by its locomotive engine as aforesaid, known, plaintiff believes, as train 'No. 29,' which said train was at that time running at a great and unlawful rate of speed, to wit, at the rate of 25 miles an hour, and that said watchman, in utter disregard of his duty, gave no notice or warn-

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ing to said plaintiff until plaintiff was crossing said track, or so near thereto as to be unable to escape being struck and run upon and against by said train running as aforesaid; that the warning them given operated, and as then given could not operate, to hinder and delay him in his efforts to prevent being run upon and against and struck by said train.

“Plaintiff alleges that but for the negligent, careless, and wrongful conduct, acts, and default of defendant, as hereinbefore set forth, he would not have been struck or run upon or against by said train. Plaintiff alleges that by being so struck and run upon and against by defendant’s train, in consequence of the negligent and wrongful conduct, acts, and default of the defendant, he was seriously and permanently maimed, injured, disfigured, and disabled, and thereby suffered and underwent, and has since said time hitherto suffered and undergone, and still suffers and undergoes, great physical and mental pain and agony; and thereby was, and is now, prevented from attending to and transacting his lawful business and affairs, and thereby was compelled to lay out and expend a large sum of money in endeavoring to get healed and cured, and thereby his buggy was demolished and destroyed.

“And for this, to wit, that heretofore, to wit, at the time of and before the commission of the grievances hereinafter set forth, the said defendant was and has hitherto continued to be, and still is, a common carrier of passengers and freight, and in and about it said business was using and occupying, and has hitherto continued to use and occupy, a certain line of railroad, a part of which then extended, and still extends, through the town of Orange, a municipal corporation, in the county of Orange, state of Virginia, and over and upon the streets of said town; that upon its said railroad track, a part of which is placed and laid through the town of Orange as aforesaid, the defendant, in and about its said business, at that time used and ran, and has hitherto continued to use and run, certain trains of cars drawn by locomotive engines belonging to the said defendant.

“Plaintiff alleges that Main street, a public street of said town, in the said town, crosses, and then did cross, said defendant’s railroad track nearly at right angles thereto, said street running nearly east and west, and that a person approaching said railroad track from the east or west side thereof cannot, and could not then, see a train approaching the said crossing from the north upon said defendant’s track, the view of a person so approaching being obstructed by buildings erected along said street and extending nearly to the track on both sides thereof, some of which obstructions were placed there by defendant.

“Plaintiff alleges that houses are built along the south margin of said Main street nearly down to the said track on the east side thereof, and that a person approaching said crossing from the east side of said Main street could not then, and cannot now, see a train approaching from the south upon said track; that the said street on either side of the said railroad track consists

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mainly of uneven stony ground, and that vehicles passing over the same create a great deal of noise, and plaintiff alleges that, owing to said obstructions of view, the noise of passing vehicles, and other noises incident to the said town, the said crossing was, and is, extremely dangerous, and the said defendant well knew it to be so, and recognizing the danger at the said crossing then had, and now has, a watchman stationed thereat to give the public timely warning of approaching trains.

"Plaintiff alleges that it was the duty of the defendant to give to the said watchman ample warning of trains approaching the said crossing to enable him to warn the public against the danger of approaching trains. Plaintiff alleges that on the 16th day of December, 1903, there was, and still is, a legal and valid ordinance of the town of Orange aforesaid prohibiting trains from being run through said town at a greater rate of speed than the rate of six miles per hour. Plaintiff alleges: That on the day and year aforesaid plaintiff, using due care, approached said crossing from the east side thereof by way of said Main street in a buggy drawn by one horse, plaintiff having first attempted to cross the said railroad at a crossing in said town some distance south of the crossing aforesaid, but was prevented from so crossing by a train standing thereon, and thereupon approached the said railroad by way of said Main street crossing aforesaid. That at the time of approaching the said crossing the train hereinafter mentioned was long past due and plaintiff supposed that it had passed. That plaintiff used due care and caution in approaching said crossing. That immediately in front of plaintiff as he approached said crossing was a one-horse wagon, which was driven across said track immediately in front of plaintiff's horse. That, owing to the noise made by the said wagon and plaintiff's buggy, and an engine then blowing off steam on the side track, it was impossible for plaintiff to hear the train hereinafter mentioned.

"That the said watchman gave plaintiff no warning of the approaching of the said train hereinafter mentioned until it was too late to escape injury; that the said defendant did not sound the whistle or ring the bell of the train hereinafter mentioned as it approached said crossing as the law requires it to do, and, owing to the obstructions aforesaid, it was impossible for plaintiff to see said train before entering upon said crossing, and plaintiff did not see or hear the same until on said crossing.

"Plaintiff avers that he drove upon the said crossing under the circumstances aforesaid, using due care in so doing, and was there struck and run against and upon by defendant's south-bound passenger train No. 29, as plaintiff is informed, which said train was running at a great and unlawful rate of speed, to wit, at the rate of 35 or 40 miles per hour. Plaintiff alleges but that for the negligent, careless, and wrongful conduct, acts, and defaults of the defendant, as hereinbefore set forth, he would not have been struck or run upon or against by said train. Plaintiff alleges that by being so struck, run upon, or against by

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said defendant's train, in consequence of the negligence and wrongful conduct, acts, and defaults of the defendant, he was seriously and permanently maimed, injured, disfigured, and disabled, and thereby suffered and underwent, and has since said time hitherto suffered and undergone, and still suffers and undergoes, great mental and physical pain and agony, and thereby was, and is now, prevented from attending to and transacting his lawful business and affairs, and thereby was compelled to lay out and expend a large sum of money in endeavoring to get healed and cured, and thereby his buggy was demolished and destroyed.

"And the plaintiff says that by reason of the premises, and by reason and in consequence of the negligent and careless and wrongful conduct, acts, and default of the defendant, as set forth in the first, second, third, and fourth counts of this declaration, he has sustained great damage, to wit, \$10,000.

"And therefore he brings this suit."

*J. D. Horsley and Geo. S. Shackelford*, for plaintiff in error.  
*Gordon & Gordon and A. T. Browning*, for defendant in error.

BUCHANAN, J. This is an action to recover damages for injuries done to the person and property of H. W. Stockdon by one of the Southern Railway Company's passenger trains running upon him whilst driving across the railroad tracks where its road crosses Main street in the town of Orange.

There was a demurrer to the declaration and to each count thereof. The court sustained the demurrer as to the first and overruled it as to the other counts.

In this ruling we see no error, as the counts which the court held to be good do not show affirmatively, as contended, that the plaintiff was guilty of contributory negligence. Neither are the other grounds of demurrer to these counts tenable, even if it were true that the ordinance of the town of Orange regulating the speed of railroad trains was unconstitutional; and that the second count does not allege that the violation of the ordinance, if valid, was the proximate cause of the plaintiff's injuries, since the other allegations in each count state a good cause of action. *A. & D. Ry. Co. v. Reiger*, 95 Va. 418, 428, 28 S. E. 590.

The defendant company objected to the introduction of the town ordinance prohibiting railroad trains from running at a greater rate of speed than six miles an hour whilst passing through its corporate limits, first, because the ordinances of the town were only open for inspection to the voters of the town, and therefore, as other persons were not permitted to see them, they could not be bound by them; and, second, because the ordinance was not pertinent testimony to any issue in the case, and no foundation had been laid for its introduction.

In answer to the first objection, it is sufficient to say that the time-table of the defendant company shows that the company had knowledge of the ordinance, since it provided that its trains must not be run at a greater rate of speed than six miles an hour in

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certain towns through which its road passes, among which is the town of Orange. As to the other objection, the violation of the ordinance was one of the grounds relied on to show negligence on the part of the company, and as the order of introducing evidence is in the discretion of the trial court, even if it was introduced before any foundation had been laid for its introduction, it would be no ground for reversal.

The plaintiff while on the stand as a witness testified that some years before his injury he earned \$40 per month as a wheelwright, and that he was earning more at the time of the accident in selling machinery upon commission, though he was unable to state the precise amount of his commissions. The evidence was objected to as remote and speculative, the objection was overruled, and this action of the court is assigned as error.

The evidence was clearly admissible as tending to show that the plaintiff's earning capacity was at least \$40 per month when he was disabled by the injuries complained of.

As is so frequently the case in actions of this kind, many more instructions were asked for and given than the questions of law involved in the case required, and more than could be helpful to the jury. The defendant company asked for 15 instructions, of which the court gave 7 as asked, 4 as amended, and refused to give the other 4. It gave for the plaintiff seven instructions. The action of the court in giving the instructions asked for by the plaintiff, except the fourth and seventh, in amending instructions 3, 6, 7, and A, offered by the defendant, and in rejecting defendant's instructions 5, 10, B, and C, is assigned as error.

Instruction No. 1, given by the court at the instance of the plaintiff, is objected to because, as we understand the assignment of error, there was no evidence upon which to base it as to the failure of the watchman to give proper warning as the plaintiff approached the crossing. While the preponderance of evidence is with the defendant on this question, there was evidence tending to show that the watchman gave no warning until it "was too late to do any good." The instruction is also objected to because it contradicts the defendant's instruction No. 12, which told the jury that the running of the train at a greater rate of speed than was allowed by the ordinance of the town "in itself was not negligence in this case which would render the defendant liable." By instruction No. 1 the jury were told, in effect, that in determining whether or not the defendant company was guilty of negligence they would consider the fact, if it was a fact, that the defendant's train was running at a greater rate of speed than was allowed by the ordinance of the town, along with the other facts of the case.

It has been frequently held by this court that the mere running of a train in violation of law or of any ordinance is not per se negligence for which a recovery can be had; yet it is always a circumstance to be considered, along with the other facts and



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circumstances of the case, in determining the question of negligence.

Instruction No. 5, given upon the motion of the plaintiff, is objected to because it is in conflict with the said instruction No. 12. By instruction No. 5 the jury were told that the plaintiff in approaching the crossing had the right to assume that the defendant would obey the ordinance of the town, and not run its train at a greater rate of speed than six miles an hour, and, if they believed from the evidence that the train was running at a greater rate of speed, the jury might consider the fact, along with the other circumstances of the case, in determining whether or not the plaintiff was guilty of contributory negligence.

For the reason given in discussing plaintiff's instruction No. 1, it is plain that there is no conflict between instructions 5 and 12.

Instruction 5 is further objected to because the ordinance could have no possible bearing upon the question of the plaintiff's contributory negligence, as he had neither seen nor heard the train.

We know of no reason why a traveler approaching a railroad crossing has not as much right to assume that the railroad company will obey the ordinance of the town, where the train is neither seen nor heard, as where he both sees and hears it. His seeing and hearing has nothing to do with the assumption that the railroad company will obey the ordinance, unless his sight or hearing informs him that the company is running its train in violation of the ordinance. In that event, of course, he could not assume what he knew was not a fact.

Instructions 2 and 3, given at the instance of the plaintiff, are objected to because there was no evidence upon which to base them. While the preponderance of evidence is in favor of the defendant's contention that the watchman did his duty in warning the plaintiff of the approaching train, and before he was in peril, yet there was evidence tending to prove (and if the jury believed it sufficient to prove) that the warning was given too late, and but for the plaintiff checking his horses when he heard the watchman's call to stop, or "Go back," he might have crossed the track unharmed.

One of the questions which the jury had to determine was whether or not the plaintiff was guilty of contributory negligence in failing to listen and look for approaching trains after reaching the tower house, which was within 6 feet of the side track, and 19 feet of the main track of the defendant company's road.

The contention of the defendant is that, inasmuch as there was no place from where the plaintiff drove into Main street until he reached the tower house where looking could be made effective, it was his duty to look for trains in both directions when he reached that point, and that, if he had done so by leaning forward in his buggy when his horse's head was within 6½ feet of the main track, he could have seen along that track in



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the direction from which the train was coming which struck him a distance of nearly 800 feet; and that his failing to do so was contributory negligence. The plaintiff, on the other hand, insists that from the time he came into Main street he had been listening for trains, and had looked through the narrow space between the Thompson house and the tower, the only place where it was possible to see the defendant's track to the north, and neither heard nor saw the train; that the watchman gave no warning and was not in the middle of the street where he always saw him when trains were approaching, which he thought meant that the way was clear; that a wagon just in front of him had crossed the track; that the ordinance prohibited trains from running more than six miles an hour through the town; that, when he passed the tower where he could see, his buggy was on the side track, and his horse's head within six feet of the main track, a place of peril if a train should pass; and that under these conditions ordinary care required him to drive rapidly over the main track, as he was attempting to do when struck by the train.

Whether or not the plaintiff was guilty of contributory negligence in failing to look for trains at that point under the circumstances disclosed by the evidence was a question for the jury. *Kimball & Fink v. Friend's Adm'r*, 95 Va. 125, 138, 139, 27 S. E. 901.

Instruction 6, given for the plaintiff, and instruction 6, as amended and given for the defendant, fairly submitted that question to the jury.

By the defendant's instruction 3, as offered, the court was asked to tell the jury that the plaintiff should have approached the crossing at such a gait as would have enabled him to stop if warned of an approaching train. The instruction as amended by the court told the jury that the plaintiff should have approached the crossing at such a gait as would have enabled him to stop if warned in time of an approaching train, and, if he did not approach at such a gait, he could not recover. The refusal of the court to give the instruction as offered, and in amending it and giving it as amended, is assigned as error.

The defendant's instruction ignored entirely the fact that there was a watchman kept at the crossing to warn travelers of approaching trains. The court did not err in refusing to give it as offered nor in giving it as amended.

The court did not err in refusing to give instruction No. 10, offered by the defendant, which was to the effect that the plaintiff could not recover if by his negligence he contributed to the accident, even if the defendant were guilty of negligence, because upon that question the jury had been fully instructed by the defendant's instruction No. 1.

Without discussing further the action of the court in giving, amending, and refusing instructions, it is sufficient to say that the instructions given submitted the case to the jury fully, and

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as favorably to the defendant as it was entitled to have it submitted, and that the court committed no error in refusing to give the other instructions offered by the defendant.

The case was clearly one for the determination of the jury, and the circuit court did not err in refusing to set aside the verdict.

The judgment complained of must therefore be affirmed.

**FRYE v. ST. LOUIS, I. M. & S. R. Co.**

(Supreme Court of Missouri, Division No. 1, Dec. 22, 1906.)

[98 S. W. Rep. 566.]

**Railroads—Injuries to Persons on Track—Contributory Negligence.**—Under Rev. St. 1899, § 1105, requiring that in all suits for damages by those injured on account of walking on a railroad track they shall be deemed to have committed a trespass, it is negligence per se for one to walk upon a track.

**Same—Customary Use of Track—Care Required.\***—Where the general public have been invited to use a railroad track by the tacit consent and long acquiescence of the company in permitting the open, known, free, and extensive use of the track by pedestrians, it owes a duty to pedestrians to use ordinary care to protect them from being injured by trains.

**Same—Evidence—Sufficiency.**—In an action against a railroad for injuries to one run over while walking on a track in the nighttime, evidence considered, and held sufficient to show that defendant had no notice that the track was so used.

**Same—Care Required as to Trespassers.\***—The operatives of a railroad train owed no duty to one walking on the track in the nighttime at a place where the track was fenced and in the vicinity of signs warning people to keep off the tracks, where there was nothing to show that notice of any use of the track by pedestrians in the nighttime had been brought to the attention of the company.

**Evidence—Res Gestæ—Declarations after Event.†**—In an action for injuries to one who was run over while walking on the track in the nighttime, on the question as to whether he was seen by the

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\*See extensive note, 21 R. R. R. 218, 44 Am. & Eng. R. Cas., N. S., 218.

†For the authorities in this series on the question when, and not, the declarations of railroad employees are res gestæ, in actions against their respective companies, see foot-notes appended to *Robinson v. Old Colony St. Ry. Co.* (Mass.), 21 R. R. R. 860, 44 Am. & Eng. R. Cas., N. S., 860; *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 20 R. R. R. 631, 43 Am. & Eng. R. Cas., N. S., 631; foot-notes appended to *Lexington St. Ry. v. Strader* (Ky.), 20 R. R. R. 273, 43 Am. & Eng. R. Cas., N. S., 273; *Wallace v. North Alabama Trac. Co.* (Ala.), 19 R. R. R. 804, 42 Am. & Eng. R. Cas., N. S., 804; foot-notes appended to *Leach v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 212, 42 Am. & Eng. R. Cas., N. S., 212.

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engineer, evidence that at the next station the engineer stated that he had knocked a man off the track was not admissible as part of the *res gestæ*.

**Railroads—Persons on Track—Care Required as to Trespasser.\*—**As against a trespasser walking on the track in the nighttime, the fact that the headlight was not burning was not negligence.

**Pleading—Defects in Petition—Waiver.**—Where, in an action against a railroad for injuries to one walking on the track, the petition alleged that plaintiff was so walking with the permission of defendant by long use and custom, and the case was tried on the theory that the permission arose from long "public use," the insufficient averment was not fatal.

Appeal from Circuit Court, Wayne County; Frank R. Dearing, Judge.

Action by George H. Frye against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

*Martin L. Clardy and James F. Green*, for appellant.

*V. V. Ing, Almon Ing, and M. R. Smith*, for respondent.

LAMM, J. George H. Frye sued defendant railway company in the circuit court of Wayne county for \$20,000 damages for personal injuries. A jury awarded him \$5,000, and, from a judgment entered on that verdict, defendant appeals.

At the close of plaintiff's evidence in chief, and again at the end of the case, defendant demurred and, its demurrer in each instance being disallowed, it saved exceptions. As defendant did not stand on its demurrer at the close of plaintiff's case, but produced its own evidence, it must be held to have waived the first demurrer, and the open question on this behalf is on the court's disposition of the last demurrer—the correctness of that ruling depending upon all the evidence.

Attending to the facts, on the part of plaintiff it was shown that he was 35 years old and, with his wife and two children, lived at Mill Springs, a little hamlet of 200 or 300 people on the line of the defendant's road in Wayne county. Say 1¼ miles north of Mill Springs was another way station, Leeper. Leeper was a village of 400 or 500 souls and there seems to have been a rather extensive sawmill there, using hands in the mill and mill-yards. At the time in hand, some 8 or 10 of these employees lived at Mill Springs, among them plaintiff. Plaintiff had been employed a year or so as a roustabout in such yards. Defendant's road between said stations is a straight line, and the grade is a slight upgrade to the north. Parallel with this portion of defendant's track and adjacent to defendant's right of way is a public dirt road also connecting Leeper and Mill Springs. The wind before daylight on the morning of February 16, 1903, was blowing a gale from the north

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\*See foot-note on preceding page.

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and the weather was freezing cold—the petition alleging it was “very cold.” From the description of the weather and the hour given by witnesses, we infer the night was uncommonly morose and bitter, the darkness being such as indicated by the proverb, “The darkest hour is that before dawn,” being deepened in this instance by heavy clouds. Moreover, there was a snow storm raging, accompanied by rain—the snow and rain being driven with vehemence to the south by a north wind. Plaintiff’s description of the night just before day is as follows: “The snow was falling and the wind was blowing; it was snow and rain mixed together and there was some snow on the ground. It was very cold weather, as we generally have here.” At another place plaintiff testified it was “slick,” and again was inquired of by his counsel as follows: “Q. You say it was snowing very heavy that morning?” To that inquiry he answered: “Tolerably heavy. Q. Wasn’t it a very thick cloud? A. Yes, sir.” At another place he says: “There was some snow and a mist of rain.” A witness for plaintiff described the weather as follows: “Q. What kind of a morning was that? A. It was about as bad a morning as a person hardly ever sees. Q. Was it snowing? A. Yes, sir. Q. From what direction? A. From the north.” Another witness, Captain Leeper, who impresses us as a very fair witness, testified the fury of the storm had not abated at 7 a. m.; that the snow was falling very fast that morning, and the wind was blowing. He lived on the public road before referred to, and about a half mile from Leeper. He took the railroad track at his home that morning at 7 o’clock to go to the latter town, and says he passed within 30 yards of where Mr. Frye must have been, and looked down that way; that is, to the south. He saw a man standing on the track; that is, could see his form but couldn’t form any idea of who it was, and we take it his inability to recognize that man (who seems to have been an acquaintance of his) and his failure to discover plaintiff was because of the blinding fury of the storm. Plaintiff left his home that morning at about 5:30 a. m., dressed in two coats, crossed the public road aforesaid and, as usual, took defendant’s main line track for Leeper, on foot, to be on hand at 6 a. m. at the opening of the mill for work. When he entered on defendant’s track, he looked and listened for an approaching train. Seeing and hearing none, he faced to the north, crossed the cattle guard at the crossing there, and, breasting the storm, traveled between the rails for a quarter of a mile, and then stopped and again looked and listened for a train. Still seeing and hearing none, he resumed his journey, neither stopping, listening, or turning his face again to look behind him, and, when about one-half of a mile from the crossing at Mill Springs and three-quarters of a mile of Leeper, he became conscious a train was coming on him from the rear. He heard no whistle or bell but heard what he described as a “humming noise,” a “very small noise,” a “little shake of the ground,” and, so hearing, turned his head and found a locomotive engine on him. From that time on, he

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knew not a whit more, except that he was hit and thinks he was hit in the back. When daylight came he was found at about 7 o'clock hanging on the fence of the right-of-way, that is, standing and leaning over the right-of-way fence, unconscious, one of his legs broken just above the ankle, his back bruised, his hip bruised, his face wounded and disfigured, his hands frozen, and, as we understand it, his fractured leg frozen. As the result of his injuries, one of his legs is shorter than the other and his hands are mutilated by the amputation of at least some of his fingers. The first glimpse of consciousness he had was his overhearing a talk by his father-in-law about sending him to the Mulvanphy hospital at St. Louis. This was about a week after he was hurt. As no question is raised over the extent of his injuries or the amount of damages recovered below, this part of the case need not be further pursued or developed.

It seems defendant's through passenger trains from the south did not stop at Leeper or Mill Springs, but did stop at Piedmont, a station a few miles north of Leeper. It seems there were two or three of these trains, grouped on the time schedule pretty close together, and, when on schedule time, passing Mill Springs in the small hours of the night, say, from 1 to 2 o'clock. Coming from afar, they were usually late at that inclement and treacherous season of the year. On the morning in question, the last of these trains was about three hours late, and was the one running plaintiff down. It seems plaintiff thought the night passenger trains had passed up north before he took the track, and he did not remember of ever meeting a passenger train at that time in the morning, but he was conscious at the time of the fact that he was likely to meet a train—witness his testimony: "Q. You knew the train would come along in a few minutes? A. Yes, sir; I knew there was trains coming along there at all times. \* \* \* Q. Didn't you know that trains were liable to come along that way any minute? A. Yes, sir. Q. You say that is right, then? A. Yes, sir." Plaintiff was the only eyewitness testifying to the fact of his being struck by the locomotive of a north-bound passenger train. So far as defendant's trainmen were concerned, they testified none of them saw him, and none of them knew of the accident at the time, and none of them heard of it until notified a fortnight or so afterwards. The testimony of the engineer and fireman, just referred to, must be considered here with an eye to any modification due to, or arising from, the testimony of two of plaintiff's witnesses. One of these witnesses was Ross. Plaintiff was hurt on a Monday morning, and Ross, who was then a section hand and now is a farm hand, had been to Poplar Bluff the Sunday before, a town 30 or 40 miles south of Mill Springs, and did not go to bed Sunday night. On being inquired of what he was doing in Poplar Bluff, he answered: "I went there browsing around." He further said, "I found right smart browsing." We infer his "browsing" was drawn out to cover Sunday and Sunday night, and until he took the train that collided with plaintiff. He rode on this train to

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Piedmont, and the following questions were propounded to him and answers given, without objection on the part of defendant, relating to what happened at Piedmont: "Q. Did you hear any railroad man, either a fireman or engineer, that got off of that train on which you went to Piedmont, make any remark as to what happened down the road? A. I seen a man get off of the engine that had stopped and I went into the depot, and he went into the depot, and I heard him say to the man through the hole in the depot office: 'I knocked a hobo off south of Leeper as I come up.' Q. Did he say anything else? A. I don't know, but I believe he says: 'I killed him or put him in the clear.' Q. Where did you hear that? A. In the depot at Piedmont. Q. Did he say anything about dumping a man? A. He said: 'He put him in the clear down the dump.'" Having allowed the foregoing evidence without objection, Ross was cross-examined, and in his cross-examination said he did not know the engineer and did not know the fireman. He said the man who made the remark registered on a book at the depot and was one or the other. He further said he didn't know the man to whom the remark was made, but he saw the man who made the remark "register." By another witness, Cook, who worked about in the mills in that neighborhood, as he said, "Off and on and not very long at a time," it was shown that he was on the train with Ross, and without objection the following inquiries were propounded to him and answers given relating to Piedmont: "Q. Did you hear anything said about that train having knocked some one off the tracks? A. Yes, sir. Q. What did you hear them say? A. I heard them say they knocked a hobo off the track. Q. Where? A. This side of Mill Springs. Q. Where was the man when he said that? A. In the depot. Q. Did you know him? A. No, sir. Q. Do you know where he came from? A. Off the train, I suppose. Q. Did you see him come off the train? A. No, sir. Q. Who was with you? A. James Ross. Q. Where was the man when he said that? A. He was right there at the depot looking through that window. Q. What was he doing? A. I didn't pay any attention to what he was doing. Q. What kind of clothes did he have on? A. I didn't pay any attention. Q. Do you know whether he was a trainman? A. I think so. Q. What makes you think so? A. I thought he was the way he talked. Q. You say he said something about knocking a hobo off the track? A. He said he knocked a hobo off the track. Q. Anything else? A. A man said: 'Did you kill him?' and he says he rolled down the ditch. Q. Do you know who it was asked him the question? A. No sir. Q. You were present when he asked the question? A. Yes, sir. Q. Who was on the other side of that window? A. He was in the same room I was. Ross and I went in there to warm." On cross-examination Cook testified he didn't know where the man who made the remark came from, that he looked like a railroad man, that he had on "greasy clothes," that he made the remark "to the fellow that was with



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him, I guess." He further testified he thought the man who made the remark came from the engine, and that the man he spoke to came off the train and he thought belonged to the engine, but he didn't know the engineer.

When defendant came to putting in its case, it introduced its engineer and fireman and showed by them that no such conversation occurred. They both testified that neither of them left the engine or went into the depot at Piedmont. They further testified that between Mill Springs and Leeper they were at their posts of duty on the engine, looking out ahead, and say they saw no one on the track between Mill Springs and Leeper. Being in court, no attempt was made to identify them as the identical persons who had held the conversation above related by Ross and Cook. It was further shown and remained uncontradicted that firemen do not register at all, that defendant's engineers do not register at Piedmont, and that the conductors alone go to the depot for orders, they wearing uniforms. The case proceeds on the theory on both sides that the train, being behind time, was running very fast to make up time, say, from 35 to 50 miles an hour—the track being straight and in good fix between Leeper and Mill Springs. There was some evidence from plaintiff and his witnesses to the effect that there was no headlight on the engine. One of his witnesses (Ross) noticed it had no headlight at daybreak at Piedmont. Two boys named Webb were behind plaintiff over a quarter of a mile and they testify they noticed there was no headlight when the train passed them. They say, however, that the cars were lit up and lights from the car windows showed plainly on either side of the train. One of these boys, Oscar, testified as follows: "Q. How far behind you was this train when you first saw it? A. Three hundred yards. Q. You could see it plain? A. I could see a light out of the windows. Q. Couldn't you see the train? A. I could see the bulk of it." There was strong evidence on behalf of defendant to the effect that the engine was equipped with an electric headlight burning all the way from Popular Bluff to Piedmont. So, too, as we gather there was no contradiction of defendant's proof that engines had been changed at Popular Bluff an hour or so before and a fresh one coupled to the train there with its headlight in perfect going order. It seems, also, from causes unexplained, that electric headlights sink down to a mere glow now and then, only to flash forth after each fit of depression into brilliancy again. It seems, further, from reasons unexplained, that sometimes carbons unexpectedly and prematurely burn out or are defective and headlights go out in consequence. If, however, the headlight of this engine misbehaved that way, at the place and time in judgment, the fireman and engineer say, in effect, they were not aware of it, and, aside from an inference to be drawn from the mere fact that such headlight was out at daybreak at Piedmont, was out when it passed the Webb boys, and that the hasty glance of plaintiff at the instant he was struck revealed no headlight to him, there was no evidence forthcoming

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that said engineer and fireman were aware of its being out. One of the Webb boys testified the rumble of the train was heard by him for a quarter of a mile as it came up from the south. A mass of expert testimony was introduced on different hypotheses. For example, contradictory evidence was introduced as to the distance in which a train could be stopped that was going at this, that, or the other rate, and further, contradictory evidence was introduced as to the distance in front of the engine a man would be on the track when he first became visible from the rays of light an electric headlight throws ahead. The details of this evidence we consider unimportant, and the evidence itself without force. And this is so because there is no question in the case calling for evidence (generally) on what distance a train could be stopped; and (generally) on how far in advance of an engine a man could be discovered in the nighttime on a track by the aid of a headlight. The only issue lodged in this case in the last regard (if any at all under the facts here) was, taking into consideration the dirty and surly night, the freezing weather, an engine plowing into the teeth of a driving and somewhat blinding storm of snow, rain, and probably sleet—we say, taking these pertinent and present conditions into consideration, then, how far in advance would an electric headlight, such as ordinarily used by prudent persons on engines, disclose to the engineer the presence of a man on the track? We find no evidence worthy of the name directed to that fact. The same observations may be directed to the expert evidence pertaining to the stopping of the train. The ability to stop a train generally—that is, the distance in which it could be stopped—was wholly in the air. The concrete case, even if such question be pertinent at all, was in what distance a passenger train of the length of the one doing the injury, going against such a storm of snow, rain, and wind as then prevailed, could be stopped with safety to the train and its occupants, on a slight upgrade, equipped with the appliances that train had, on a track affected by snow and rain, and, more than likely, ice, because it was freezing weather and we may take judicial notice of the law of nature pertaining to the effect of frost on rain. We find no testimony even remotely bearing upon that precise question.

There was evidence on one side that no crossing signal was given for Mill Springs, and evidence to the contrary on the other. As said, plaintiff before being struck heard no signal, and the two boys following him that morning, and over a quarter of a mile to his rear, testified no signals were given. On this score defendant's said employees deny seeing plaintiff in jeopardy, and, of course, they had no occasion (on their theory) to give any signals at the place of the accident and gave none.

Plaintiff's case was put to the jury and is put to us here on the theory that the track between Mill Springs and Leeper was fenced, that the place of the accident was in the country where the road ran through farming land, and yet, that it was a place

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where defendant had no right to expect a clear track, even in the nighttime, and therefore owed a duty to persons on the track to look out for them, to see them in danger, and to exercise ordinary care to prevent injuring them. Plaintiff says defendant neglected that duty. To bring the case within the foregoing theory, plaintiff introduced a mass of testimony relating to the use of the track by pedestrians, the substance of which is as follows:

Plaintiff's testimony was to the effect that he got on the track at Mill Springs that morning, the same as he had been doing for over a year, and further: "there was a heap of people going and coming both ways, night and at all times during the day;" that he had never been forbidden by anybody or told not to use that track; nor had he heard of anybody else being forbidden to use it. He said, too, that many people used the track in going back and forth between the towns of Mill Springs and Leeper. On cross-examination, he was asked if he could read, and he replied: "A little bit." He said he never read any notice stuck up to keep people off the company's right of way and track; never saw such notice; never saw any signboards forbidding people to go on the right of way, or making them trespassers; said he wasn't looking for signs; said he knew it was dangerous to walk on the railroad, but "I had to walk on the railroad to get to my work;" said there was a branch across the public road, running out of the horse lot of Captain Leeper (Leeper lived along the public road between Mill Springs and the town of Leeper), that had water in it in rainy weather, and he walked on the railroad to keep from wading that branch.

Doctor Owens testified for plaintiffs that he lived at Mill Springs about 16 years; that people passed back and forth between the two towns frequently; that they traveled both the dirt road and the railroad—the railroad more extensively than the dirt road; that this had been so during the time he had lived there. "Q. Is that during both night and day? A. Yes, sir; there is more travel at night than by day. \* \* \* Q. There are a great many people living at Mill Springs that work at Leeper, are there not? A. Yes, sir. Q. How many? A. I don't know exactly; some few. Q. Twenty-five or thirty? A. No, sir; some eight or ten, possibly. Q. Was it the custom for the people living at Mill Springs to come down to the saloon [at Leeper] after night to drink? A. Yes, sir; I think so." He further testified that he never heard of any "objection to this." There was evidence from this witness that there was a saloon at Mill Springs as well as at Leeper. On cross-examination Dr. Owens testified he knew notices were stuck up forbidding trespassing on the tracks and right of way. Witness here identified a notice that had been posted at Mill Springs. The notice was plain for everybody to see. Said notice, read in evidence by defendant's counsel, was to the effect that persons not having business with the company's agents or employees were positively forbidden to enter, sit, stand, or walk upon the tracks, right of way, etc.; are forbidden to enter on the company's property to

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transact their private business; are notified that they have no legal right to disregard this notice; and that in every such case they are trespassers, etc. This notice was signed by the general superintendent of defendant company. Doctor Owens further said that most everybody traveling from Mill Springs to Leeper who walked on the railroad did so because it was a better walk. Witness knew when he was so walking that it was against the express rules of the company; knew that he was in danger of being struck by a train; intended to take his own risk and step out of the way if the train did come. Witness knew about the branch spoken of by plaintiff in his testimony; said it was a dry branch, that sometimes in wet weather it interfered with traveling, but that "Captain Leeper generally keeps a plank across it," always kept a plank there "except in case of high water, when it is washed away." On re-examination witness spoke of a place on the dirt road called the "Narrows" and said that through the "Narrows" it was generally bad walking, that the best way was to go on the railroad track, that sometimes people would go down the dirt road to the "Narrows," and then get over on the track, that was the way a good many people went.

Captain Leeper testified for plaintiff that footmen have been using that portion of the track ever since the road was built; that the people of the two towns used it; that when the dirt road was muddy nearly all the foot traveling between the two towns is by the railroad, and that, when the dirt road was dry, a good many of the people going from Mill Spring to Leeper get off the dirt road at the "Narrows" and cross over the railroad fence and from there on travel up the track. Witness said he never paid any particular attention to the number, but it was very seldom you couldn't see some one. He did not know about the night travel. He used the railroad himself, crawling over the right of way fence at his place. He did this because the track was dry. Witness estimated that the larger portion of the people traveling between the two towns used the railroad and he thought this had been going on for about 10 years. Witness in his examination in chief, however, said that, while he never had read the notices, yet he supposed the railroad company had put up notices. On cross-examination, the witness said he had seen such notices, though he had never read them, yet he had an idea what they were and that the company forbade the use of its track. He always thought enough about it to look out for himself, and "had an idea" that traveling there was against the notices and instructions of the company, and that when he traveled on the railroad track he took his life in his own hands and looked out for it. Witness said there had been several men killed between these two places. Some of them were drunk, and some of them not. Witness did not think that the larger portion of the men going from Mill Springs to Leeper went for the purpose of drinking at the Leeper saloon. He thought the larger portion went back and forth on business. He had seen as many as 10 or 12 leave Mill Springs to walk to Leeper.

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The witness Ross, heretofore referred to, said on cross-examination that he resided at Mill Springs and that when he wanted to go to Leeper he walked to the railroad. Witness identified the notice against trespassing, heretofore in evidence, and said he had seen it many times; that it was plain for everybody to see, but he didn't believe he ever read it; that he never had any permission from anybody to walk down the track. On re-examination he said he hadn't walked the dirt road a dozen times in 17 years, but had walked a part of the way, down to the "Narrows"; that it was at the "Narrows" where most of the people got on to the track, but some of the people got on at Mill Springs crossing. Witness had never heard of officers of the road informing footmen they ought not to walk on the railroad. Witness never saw any notice or warning against it on the part of the company "except that big board set out there." People used the track for passing between the towns notwithstanding the warning. He said there was nothing to "prevent a railroad man from knowing that people passed up and down this track."

By Oscar Webb, plaintiff showed that he, Webb, a 15 year old boy, worked at Leeper and lived at Mill Springs. Webb said he used the track in going and coming, that most of the people did the same. On cross-examination, witness testified he had seen the notice forbidding people to go on the right of way, that the notice was up at the time of the accident, that he had seen it many times. Witness knew he was going against the instructions and directions of the company in going on the railroad, and he went there expecting to take care of himself. He also testified that plaintiff was hurt south of the "Narrows"; that is, between the "Narrows" and Mill Springs.

By James Webb, a brother of Oscar, plaintiff showed that he also lives at Mill Springs and had worked at Leeper for about two years and used the railroad track. Witness testified the railroad was fenced, and that he and the rest would get on it at Mill Springs, crossing over a cattle guard in order to do so. He also said that sometimes people going from Mill Springs up the dirt road got on the track at the "Narrows," saw the sign of people getting on there; that is, a pathway. Witness said that no one representing the railroad company ever objected to his walking on the track and he had frequently met sectionmen. The travel was by day and by night. Witness never heard of any rule against walking on the track, never heard of any statute law against it, had been walking there for two years. On cross-examination, witness said he could read print, admitted he had seen a sign put up to keep people off the right of way, but said he had never read it. On being further pressed, he said he didn't know it was a sign to keep people out of danger, and said he didn't have any idea what it was, and didn't know what it was there for, that he heard no one say, and didn't know whether his brother Oscar was older than he or not.

By William Radford, plaintiff showed in chief that he lived at Mill Springs and worked at Leeper. He said most of the



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people traveling between the two towns used the railroad, and he never heard of the railroad company making any objections to such use of the tracks. This witness also said people left the dirt road and got on to the railroad at the "Narrows," and that the top wire was broken there, between posts, and had been broken a "right smart bit" and said there was a pathway there. On cross-examination, witness said he had seen the notice against trespassing and using the tracks, introduced in evidence, and had read it, and knew it prohibited the use of the right of way; didn't think much about violating the rules of the company; knew it was the company's road and he guessed they didn't want anybody to go that way. He further testified he went on his "own hook" and intended to take care of himself; that he never saw any notices posted at Leeper against trespassing, but the one at Mill Springs was out where the public could see it. On recross-examination, witness admitted seeing a sign also at the crossing at Mill Springs warning people, but he couldn't say whether it was there at the time of the accident or not.

By Mr. Green, plaintiff showed that he, Green, lived at Leeper; had lived there a year and eight months; had seen one danger signal (notice?) at Leeper; thought it was knocked down with a coal-oil can in 1902; hadn't noticed one since. This witness, who was 19 years old, said he traveled several times between Mill Springs and Leeper; that other people used that track "a great deal"; couldn't say how many, but "a good many." And finally the witness hazarded his opinion that "a big portion of Leeper, something like 150 people" used it "every day." On cross-examination, witness said he never had seen any notice except the one in the yard at Leeper notifying people to keep off the track. He also said that, when he traveled on the track, he understood he was traveling there against the rules and notices of the company, and understood he went on the track against the objections of the company, and said he went there expecting to take care of himself, and get out of the way of a train.

By Mr. Holiday, plaintiff showed that he lived at Leeper one year and at Mill Springs two years; that he had walked from one town to the other, but not frequently; that people generally went by the railroad; that is, decidedly more than went on the dirt road. Witness had seen men go both ways. On cross-examination, witness said he had seen notices at Mill Springs for people to keep off the track, and he understood, when he went on the track, he was going there against the desire and will of the railroad company. Witness said he didn't go on the track believing he had the company's consent, but went there because he thought it was better walking.

By Mr. Huter, defendant showed that he, Huter, was section foreman at Mill Springs. Witness identified the notice and warning heretofore introduced in evidence and said it was at the depot door. He also testified there was another notice at or about, the crossing at Mill Springs; had seen the same kind of a notice at



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Leeper before and after that; that sometimes people tore them down, and, as we understand it, they were put back again.

By Mr. Allison, its station agent at Leeper, defendant showed there was a notice at Mill Springs at the station, and also one at the crossing there of the character heretofore indicated, and also one at Leeper. There was another warning notice there, having the same end in view, a square board stuck up on the station platform. This was found down once but the sectionmen put it up again. It was torn down again and again replaced. It was the duty of the sectionmen to keep it up.

The foregoing is the evidence pertaining to the use of the track by the public, and the efforts of defendant company to prevent that use.

The case was tried on an amended petition, and the only allegation made relating to the use of the railroad track as a pathway between Mill Springs and Leeper was the following: "For his cause of action, plaintiff states that on the 16th day of February, 1903, he was, with the permission of defendant, by long use and custom, walking on the railroad track of defendant, between the towns of Mill Springs and Leeper \* \* \*" The negligence complained of was that defendant's train was run "negligently, carelessly, and recklessly \* \* \* at a very high rate of speed and failed to sound the whistle or ring the bell or to have any headlight on said engine or to do anything to warn plaintiff of its approach; that plaintiff did not know of the approach of said engine and train in time to avoid his being hit by it, because of said negligence \* \* \* in failing to sound the whistle, ring the bell, or have a headlight on said engine; \* \* \* that said agents, servants, and employees of defendant knew, or, by the exercise of ordinary care and caution, could have known, of the danger in which plaintiff was, in time to have prevented plaintiff from being injured by said engine and train." There is also a complaint made of negligence in leaving plaintiff, wounded and unconscious, to freeze by the side of the track in winter weather, but the details of this complaint we deem unimportant, since that specification of negligence was not put to the jury. The answer admitted defendant's incorporation, denied every other allegation in the petition, and pleaded plaintiff's contributory negligence. The replication put in issue the new matter in the answer. On issues thus outlined and on such evidence, had plaintiff any case on the law? This question is the major one and lies at the threshold of the investigation. If answered "Yea," then we must address ourselves to other errors assigned. If answered "Nay," other assignments of error become moot questions, not calling for judicial consideration in this case.

The disfigurement and injury of plaintiff bespeak sympathy, but they, considered alone, do not disturb the scales of justice, but leave them in exact equilibrium. No liability can be predicated upon the mere happening of an accident, unless it be an accident of such character that the thing speaks for itself; i. e., one controlled by the maxim, "*res ipsa loquitur*," in no wise applicable

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here. Sympathy is an element in the administration of justice, but a subordinate one. Sympathy may incline the ear of justice to hear; it may soften the sensibilities and elicit the attention of justice; but the reason of the judge, and that alone, must sit in judgment. When plaintiff put himself on a railroad track on which trains run, if he remained there long enough in the night-time, his death or hurt was inevitable. In so far as it was inevitable, reason ought not to concern herself with the distribution of praise or blame. Turning our eyes, then, from the mere injuries plaintiff suffered and the mere dramatic incidents of time and circumstances disclosed by the evidence, we must seek for actionable blame, if any, elsewhere, the controlling question not being was plaintiff injured, but being, who was to blame for the injury? Was it plaintiff, or was it defendant?

1. In the first place we may start with the fundamental proposition that defendant was presumably entitled to a clear track between Mill Springs and Leeper. The law allows that presumption. Its track and right of way there were segregated and inclosed by side fences, by wing fences and cattle guards. That is to say, there were present the usual indicia of a private inclosure. Not only so, but the statute forbids any person, not an employee, to walk upon any such railroad track, and requires that, in all suits brought for damages by persons harmed on account of walking on such track, they, in the act of so walking, "shall be deemed to have committed a trespass." Rev. St. 1899, § 1105. The working theory the courts have adopted to give effect to the section just referred to is that such acts are considered negligence per se and will defeat recovery in a case where contributory negligence would defeat it. *Morgan v. Railroad*, 159 Mo., loc. cit. 276, 60 S. W. 195. Not only does the written law lie with that view, but such view is fortified by the reason of the thing. Thus the right of way is acquired by purchase or compensated for in damages under the watchful eye of courts and the stringent application of constitutional and statutory safeguards, and the easement of railway companies in their tracks and rights of way, from the very necessity of the thing, is deemed in the first instance a paramount and exclusive one. For instance, trains run at great speed both by day and by night. The property of shippers, the life and limbs of passengers and trainmen are all fettered to, and bound up with, the proposition that trains should have a clear track in the country and between crossings. If we gave way to any other view, we would open a floodgate for manifold wrongs to the traveling public and public service corporations, to enter, and there would be "fine" grinding in the mill when the waters of that flood came in. If A. and B. at their own, and against defendant's will may appropriate defendant's track for their private walking, then, by that token, they may also appropriate the track for the use of their horses, their asses, their sheep, their swine, and horned cattle. It ought not to be expected that we would so hold as to encourage a notion adding new

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dangers to the array now confronting trainmen and the traveling public, and thereby make a gazing stock of the law.

2. But, while the general proposition laid down in paragraph 1 of this opinion is well enough as a general proposition, yet a railroad company may waive its right to a clear track; that is, it may know of, and acquiesce in, the use of portions of its track by the public. And while such appropriation, use and acquiescence may each and all be wrongs to travelers journeying by trains, to shippers, and trainmen, yet, such appropriation, use, and acquiescence may result in a situation requiring the application of a modified proposition of law. This modification springs into existence when a situation arises wherein a railroad company may be entitled to a clear track, yet has no right to expect one. In such a case, out of tenderness and regard for limb and life, it has been held that, where the general public have been invited to use the track by the tacit consent and long acquiescence of a railroad company in permitting the open, known, free, continuous, and extensive use thereof by footmen, then it owes a duty to such footmen to use ordinary care to look out for them and ordinary care to protect them from being run down and maimed or killed. *Frick v. Railroad*, 75 Mo. 595; *Williams v. Railroad*, 96 Mo. 275, 9 S. W. 573; *Chamberlain v. Railroad*, 133 Mo. 587, 33 S. W. 437, 34 S. W. 842; *Morgan v. Railroad*, 159 Mo. 262, 60 S. W. 195; *Fearons v. Railroad*, 180 Mo. 208, 79 S. W. 394; *Fiedler v. Railroad*, 107 Mo. 645, 18 S. W. 847; *Eppstein v. Railroad* (Mo. Sup. not yet officially reported) 94 S. W. 967.

3. Did plaintiff bring himself within the doctrine of the rule announced in paragraph 2 of this opinion? That is, was the place he was struck a place defendant was entitled to a clear track but had no right to expect one? To bring a case within that rule, the use established in the public may be likened somewhat to that giving rise to a prescriptive right; i. e., the use must be a known use, and must be confined to the limits proved. In this case, if it be conceded, *arguendo*, the use of the track was so open, so continuous, and so pronounced that knowledge of the daytime use would be inferred, yet it must be apparent no such use was established for the nighttime. Plaintiff's learned attorneys sought to establish the night use, but their evidence fell short of proving a case to go to the jury on that issue. The night use of this track by pedestrians was confined to two classes: First, the class to which plaintiff belonged, to-wit, the mill-men living at Mill Springs and working at Leeper, some eight or ten in number, and the utmost the evidence tends to show is that when the days were short and the nights long, these men used this track after dark to come and go, as plaintiff did. The other night class, as we construe the evidence, were those thirsty denizens of Mill Springs, who, having dry whistles and parched gullets, wet them at the Leeper saloon, and who, like Tam O'Shanter, habitually lingered over the cup at a distance from home after dark in spite of the dangers besetting the road. Of this latter class it may be said that one swallow does not make a summer, nor will the law

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make a public use of a railroad track out of many swallows, or swallowers, of the character under review. Indeed, we may ask whether the dry whistles after sundown in Mill Springs were notoriously so many and so dry—the nocturnal thirst there of such Gargantuan proportions—and the quality of liquor at the Leeper saloon was notoriously so fetching and seductive that defendant's engineers, busy with the serious affairs of life must be held to know thereof as a fact of current local history and govern themselves accordingly? We think not. Such matters do not usually proclaim themselves like an army, with banners, or cry aloud from the housetops. In the absence of proof, we will presume that defendant's sectionmen were not on duty after dark, and the case is barren of testimony bringing home notice to the employees, agents, and officers of defendant of such use of their track by night brawlers and tipplers. Acquiescence, in the very nature of things, assumes a prior knowledge—the one cannot exist without the other.

4. No cases give rise to more perplexity than cases of the character now under consideration. Men, in flippant and defiant disregard, and in the teeth of the protest of railroad companies, take their lives in their hands and unconcernedly walk in the nighttime on the piked-up paths of railroad tracks and thus seek to avoid the inconvenience of travel on dirt roads in muddy weather—applying to railroad tracks the doctrine of the right to travel extra viam when the roads are foundeours—and when injured seek the courts for relief. In the Eppstein Case the writer had occasion to refer to that character of sporadic use, and this court approved the exclusion of such use as an element in that case.

It must be evident that railroad companies are, in a sense, defenseless against such misappropriation of their tracks by footmen. They fence the right of way, they protect the track by cattle guards, and, in this instance, defendant kept up notices and signs warning the public and protesting against their use of its track. We are brought, then, face to face with this asking proposition: What more can a railroad company do, or should it be required to do, to protect itself against the appropriation of its track by footmen, who are sui juris, than was done in the case at bar? Shall it employ armed guards? Shall it build fences that cannot be scaled, crawled through, or broken down? Shall it plant spikes in its cattle guards to the danger of its own employees? or use pitfalls? or what can it do? We confess our inability to answer. In our opinion, in a country district, away from congested populations, under the facts of this record, defendant did all that could be fairly asked of it when it inclosed its right of way and posted and kept up the signs shown in evidence.

We come to this conclusion, notwithstanding it has been held, and properly held, that, after notices posted, a long and continued public disregard of such notices, to the knowledge of defendant's employees, may be held to waive the notice. Such was the case of *Fearons v. Railroad*, 180 Mo. 208, 79 S. W. 394, *supra*. But the law of that case must be read in the light of the facts of that

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case. As we interpret the case, a street railroad track was in a public street, Eighth street, and ran to a place where Eighth street was not open, and continued in the line of the street into the mouth of a tunnel. This tunnel was 25 or 28 feet from bottom to top; and over the mouth, and, we infer, at the top, was a sign "No Admittance." The tunnel lay so that any one driving or walking along there might suppose it was a continuation of Eighth street. Watchmen had been employed at the entrance to keep people out, but such employment had been discontinued. The place was thickly settled and built up and the tunnel was used to connect two portions of a great city. It had a spring in it that people resorted to for water. Children and other people in "great numbers" walked through this tunnel daily, and the beaten paths there showed such long and constant use. As we understand it, the accident occurred in daylight. A man, one Newgent, was employed in this tunnel to sand the tracks and he had no instructions to keep people out. Mr. Fearsons, an old man, wandered in there. He was seen by a superintendent of the company, who ordered Newgent to get out. While trying to get him out and while the old man was fast in a hole, he was run down by a street car and killed. The employees having charge of the car had space and time and light to see him, but did not see him and the question was whether it was their duty to see him. Fox, J., in disposing of that case and holding defendant liable, says this (page 221 of 180 Mo., page 397 of 79 S. W.): "The only objection to the use of the tunnel was indicated by the sign, 'No Admittance.' This signal was not heeded, and, if the number of pedestrians passed through the tunnel daily that the testimony tends to show, it is but a fair and reasonable inference that the motormen and conductors operating defendant's cars continuously, knew that this signal, 'No Admittance' was unheeded, and that the numerous people spoken of by the witnesses were using this tunnel as a passway." It will be seen the facts in the Fearsons Case differ materially from the fact in the case at bar. There notice was brought home to the very employees running the car doing the damage that the sign, "No Admittance," was disregarded. The time, the place, the character of public use, all differ from the case we are considering. In this case the trend of the evidence introduced by plaintiff from those using defendant's track between Mill Springs and Leeper was to the effect that these notices were not dead and abandoned; they were live notices; they were put up when torn down; and it is of significance that nearly all of plaintiff's witnesses understood there was life in the notices and death on the track; that they went on defendant's track against defendant's will, and expecting to look out for themselves. Space will not permit an analysis of the Morgan Case, the Epstein Case or other cases relied upon by plaintiff, but examination shows they too, differ in vital particulars from the facts we are considering. We are pointed to no case going as far as plaintiff insists we should go in order to sustain this judgment, and, confining our conclusion on this branch of the case to the precise



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facts of the record, that conclusion is that at the place Mr. Frye was struck by defendant's engine, and at the time, to wit, in the nighttime, it was a place and a time where defendant not only had the right, but it was entitled, to expect a clear track. Hence it was a place defendant owed plaintiff no duty to look out for him; and hence, in order to recover, plaintiff must show that he was actually seen by the engineer in time to have warned him and thus avoided his injury. *Rine v. Railroad*, 88 Mo. 392; *Barker v. Railroad*, 98 Mo. 50, 11 S. W. 254; *Sinclair v. Railroad*, 133 Mo. 233, 34 S. W. 76; *Reyburn v. Railroad*, 187 Mo. 565, 86 S. W. 174.

5. The case then narrows itself to this: Was plaintiff seen by defendant's servants running its engine in time to warn him? There is no direct evidence this was so, but there is a mere glimmer of testimony inferentially tending to show they saw him. Thus, at another time, to wit, afterwards, and at another place, to wit, Piedmont, some man in "greasy clothes" was seen to leave the engine and go into the depot and "register." This man was believed to be the engineer, and was overheard making an admission that he had "knocked a hobo off the track south of Leeper." This evidence, if objected to, was inadmissible in chief to fasten liability on defendant. It was no part of the *res gestæ*. It was made subsequent to the event and no principle is more firmly settled than that an agent cannot bind his principal in that way. *McDermott v. Railroad*, 73 Mo. 516, 39 Am. Rep. 526; *Adams v. Railroad*, 74 Mo. 553, 41 Am. Rep. 333; *Bergeman v. Railroad*, 104 Mo. 77, 15 S. W. 992. It must be remembered this evidence was not offered by way of impeachment to stain or destroy the credibility of the engineer and fireman. If the condition of the proof had warranted such impeachment, the rule would be otherwise. *Spohn v. Railroad*, 122 Mo. 1, 26 S. W. 663. But the testimony was unobjected to and may not be discarded on appeal, but is lodged in the case for what it is worth. *Kash v. Coleman*, 145 Mo., loc. cit. 649, 47 S. W. 503; *Farber v. Railroad*, 139 Mo., loc. cit. 284, 40 S. W. 932; *Carney v. Carney*, 95 Mo., loc. cit. 358, 8 S. W. 729; *Cady v. Coates*, 101 Mo. App., loc. cit. 152, 74 S. W. 424. There may be an inference that this man in "greasy clothes" was the engineer of the engine doing the injury, and, if so, the admission carries with it the inference that he saw plaintiff, but when he was seen and at what distance from the engine and under what circumstances may only be conjectured. May we relieve plaintiff of the burden of showing negligence? Certainly not. May we fall back upon some presumption that the headlight, if there, would disclose the presence of plaintiff at a sufficient distance in front of the engine to give time and space for his warning and escape? This might be so under ordinary conditions, but not in such a storm, where the record is silent on the condition of the cab windows from the freezing wind, the pelting rain, and the snow, and silent on the effect on the headlight of such a storm. It must be remembered, too, that this engine was going at a great speed, as it had the right to do, that



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the atmospheric condition then prevailing would make eyesight uncertain and probably the form of a man on the track a flitting shade. We shall not hold the engineer owed a duty to plaintiff, a trespasser, to thrust his head out of the cab window and face such a storm, and, we hold there is no testimony to support the theory Mr. Frye was seen in time to warn him. But plaintiff's attorneys argue there was no headlight. It will be noticed that the absence of headlight is pleaded in the petition as a negligent act towards plaintiff. We need not inquire whether such act would be negligent if injury came to passengers therefrom, or if injury came to persons at crossings therefrom. The question is whether plaintiff, a trespasser, can complain of the absence of such headlight. The answer to this is self-evident. The headlight was not intended for trespassers on the track. It was intended for the safety of trainmen, of passengers, and of those having a right to be on the track. The rule is that a general duty of a railroad company to run its trains with care becomes a particular duty to no one until he is in a position to have a right to complain of the negligence. *Barker v. Railroad*, 98 Mo., loc. cit. 54, 11 S. W. 254. And furthermore, it will not escape attention that there is no evidence of the negligent absence of a headlight. There is evidence one was absent, but the uncontradicted proof is that these headlights go out from one unexpected and unavoidable cause or another. There is uncontradicted evidence this engine started with a going headlight from Poplar Bluff, and shall we presume, because it was out at a certain time and for a certain distance, that the absence of such light is negligence in a country district between crossings where defendant was entitled to a clear track and had no reason to expect the track was not clear? Certainly not. Taking the case made below and presented here, we are of opinion defendant's demurrer to the evidence should have been sustained, and we so hold.

6. In coming to the foregoing conclusion we have construed the allegation in plaintiff's petition relating to the use and custom in making a pathway of defendant's track in the most favorable light possible. That allegation is scanty, indeed, and is compressed in one line, to wit, "he was, with the permission of defendant, by long use and custom, walking on," etc. A close view of that allegation might be that the custom and use relied on were a custom and use singular to plaintiff and did not embrace the public at large. But the case was tried below on the theory that the permission to plaintiff arose from the fact of long public use of the track, and, the case having been tried on that theory on both sides, the insufficient averment in the petition is not fatal. *Bragg v. Railroad*, 192 Mo., loc. cit. 358, 91 S. W. 527, and cases cited.

The judgment, being unsupported by proof of negligence, must be, and is reversed. All concur.

PHILLIPS *v.* WASHINGTON & R. Ry. Co. OF MONTGOMERY COUNTY.

(Court of Appeals of Maryland, Dec. 19, 1906.)

[65 Atl. Rep. 422.]

**Appeal—Record—Necessity of Bill of Exceptions.**—A ruling of the trial court not included in bill of exceptions will not be considered on appeal, though the prayer upon which the ruling was based is appended to the record and printed therein immediately after a bill of exceptions.

**Railroads—Accidents at Crossings—Contributory Negligence—Unobstructed View.\***—It was contributory negligence, barring recovery against an electric railway company for injuries at a crossing, for one to attempt to ride a horse across the track, where he could have seen the approaching car in time to have avoided a collision, but failed to look.

**Same—Country Crossings—Degree of Care Required.**—Since a higher rate of speed in the movement of electric cars is permissible in the open country than along the streets of a city, more caution is demanded of one crossing tracks in the country than in cities.

Appeals from Circuit Court, Howard County; I. Thomas Jones and Wm. H. Thomas, Judges.

Action by Joseph N. Phillips against the Washington & Rockville Railway Company of Montgomery County. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BOYD, PEARCE, SCHMUCKER, and BURKE, JJ.

*Charles W. Prettyman*, for appellant.

*H. Maurice Talbott*, for appellee.

McSHERRY, C. J. This is a personal injury case, and there is but one question raised on the record. At the conclusion of the testimony the trial court granted an instruction which directed the jury to return a verdict in favor of the defendant on the ground that the plaintiff had been guilty of contributory negligence. Was that ruling right? All the other prayers presented by both sides were rejected, but, inasmuch as they are not included in the only bill of exceptions contained in the transcript, they will not be alluded to, even though they have been appended to the record and have been printed therein immediately after, but not as a part of, the bill of exceptions.

The Washington & Rockville Electric Railway runs from Washington to Rockville. For some portion of its route it oc-

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\*See foot-note appended to *Cranch v. Brooklyn Heights R. Co.* (N. Y.), 21 R. R. R. 610, 44 Am. & Eng. R. Cas., N. S., 610; foot-notes appended to *Kannenbergh v. Conestoga Traction Co.* (Pa.), 21 R. R. R. 80, 44 Am. & Eng. R. Cas., N. S., 80.

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cupies a part of the roadbed of a public road which was formerly a turnpike road. At the place where the accident occurred, and for some distance on either side of that spot, the electric roadbed occupies from 10 to 15 feet in width of the upper or eastern side of the old turnpike road. No plat of the locality appears in the record, and the description of the surrounding topography is very confused and imperfect. Going from Rockville towards Washington on the turnpike road, the railroad at and along the scene of the accident is upon one's left hand; that is, upon the left-hand margin of the turnpike road. At a point described as Lochte's shop, nearer to Rockville than the place of the accident, there is a long siding used to enable cars going in opposite directions on the single track of the electric road to pass. Further down towards Washington is Walsh's crossing, a road or way leading from the upper or eastern side of the turnpike road to Walsh's residence and to Chevy Chase Circle, a thickly settled suburban settlement not far distant from Washington. A car going from Rockville to Washington, after rounding a curve at Lochte's shop and reaching Wilson's store, can be seen from Walsh's crossing on looking towards Rockville for a distance of 300 yards before it gets to the crossing. On the 12th of August 1903, Phillips, the appellant, was engaged in making hay on the farm of Dr. Walsh near the crossing. The car from Rockville to Washington was due at the siding at 2 o'clock, and was not in the habit of leaving the siding until the arrival of the car from Washington to Rockville, which was likewise due at the same hour. The appellant, who lived in the vicinity of the siding and was familiar with the running of the cars, left his home shortly before 2 o'clock, p. m., to go to Walsh's field. He rode from his home sidewise on his horse, in his shirt sleeves with a pitch fork on his back. The direction he went along the turnpike was towards Washington. Both of his legs were on the righthand side of the horse, and his back was consequently towards the railway track. He was proceeding in a line parallel to the railway. When he reached Walsh's crossing he turned to the left, and this brought his horse face to face with the railway tracks. He was then between 10 and 15 feet distant from the tracks. He could have seen, according to one statement in the record, 900 feet up the track towards Rockville, and according to another statement 450 feet in the same direction, at the moment he turned to his left to go over the crossing. He says he slightly halted his horse, and looked in both directions, but saw no car approaching from either Rockville or Washington. He then proceeded to cross the track, and, after he and his horse had gotten nearly over, the car from Rockville struck the horse on the left hindquarter, and threw horse and rider against a trolley pole, injuring both. The theory upon which the court below acted, in granting the prayer to which exception is taken, assumed that there was evidence tending to prove some negligence on the part of the railway company, since it denied the appellant a right to recover because he had been guilty of contributory negligence; and there can be no

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contributory negligence where there has been no primary negligence on the part of the defendant. We need not, therefore, inquire whether the railway company was guilty of negligence on the occasion in question; nor need we review the evidence tending to establish such negligence, for the existence of negligence is implied as a postulate in the granted instruction. On the facts stated, was there such a clear, decisive, and prominent act on the part of the appellant as in law amounted to contributory negligence? Do the facts leave no room for ordinary minds to differ in respect to the conclusion to be drawn from them?

If the approaching car could have been seen by the appellant in time to avoid the collision had he looked in the direction it was moving, and he says he did not see it, then it follows that he did not see it solely because he did not look, notwithstanding he says he did look, unless it is shown that his eyesight was so defective that it was impossible, by reason of that fact, for him to see it. But there is no pretense that his vision was impaired, and hence the conclusion is irresistible that, though he says he looked, he failed to see the approaching car because he did not look; and, if he did not look before crossing the tracks, he was guilty of sheer contributory negligence. During the whole time he rode along the turnpike, his back was towards the tracks, and, when he turned at right angles to go over the crossing, his back was towards the approaching car. He was facing Washington after turning. If he then glanced to the right, he looked away from the tracks; if he glanced to the left, his line of vision was directly over and perpendicular to the tracks at the crossing. To have seen up the tracks towards Rockville, and therefore towards the car which finally struck him, he would have been obliged to turn completely around on his horse and face in a direction precisely opposite to the one he occupied after he had turned his horse to cross the tracks. He does not say he did this, and, unless he did do so, it was not possible for him to see the oncoming car. If the car was not in sight just before his horse stepped on the track, then the car must have run not less than 450 feet during the time the horse, in a walk, covered less than six feet, the distance between the place where the hind quarter of the horse was when it was struck and a position of safety before entering on the tracks. It did not take the horse over two seconds to walk six feet, assuming that he walked at a slightly faster gait than two miles an hour. The car, to reach simultaneously the same point occupied by the horse, would have been required to traverse 225 feet a second, which would be at the rate of 270,000 yards, or something over 153 miles, an hour. There is, of course, no pretense that any such speed was, or could have been, made. If the car was running at 30 miles an hour, as some of the evidence indicated, it required 10 seconds to cover the distance of 450 feet intervening between the point where confessedly the car could have been seen by the appellant as it and he approached the crossing, and the point where the

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collision occurred. The appellant and the car approached the crossing in directions at right angles to each other, and the appellant's back was turned squarely towards the oncoming car. There were at least 10 seconds during which he could have seen that car if he had looked; and 10 seconds, if one will take a watch and tell them off, is a very appreciable space of time. Certainly that period offered an ample opportunity for the appellant to halt before attempting to cross the tracks. It was carelessness on the part of the appellant to venture on the tracks with his back towards the car which struck him, and his injury was undoubtedly due to his inability to see up the track in his rear, and his inability to see up the track was occasioned by his voluntary assumption of an attitude in riding which no prudent man would have taken in crossing a railway track. If he had been riding his horse in the usual way, he could, by a slight turn of his head, have seen the car in time to have awaited in a place of safety its passage over the crossing. His failure to do this directly contributed to the production of the injury which befell him. He cannot therefore ascribe the collision solely to the negligence of the railway company.

In considering this question of contributory negligence, it must be borne in mind that the injury did not occur on the streets of a city, but in the open country, where a higher rate of speed in the movement of electric cars is permissible than is allowable along the more crowded thoroughfares of a town. More caution was therefore demanded of a person in crossing a track of an electric railway in the country than would have been necessary in the city. The use of no greater caution in the open country than would have been requisite to constitute ordinary care and prudence in the city would not have been due care and caution on the part of the individual in approaching and going upon an electric railway crossing in the country. An act which would be prudent in the city might be glaringly negligent in the country, and hence the standard by which contributory negligence is to be measured in the two instances necessarily varies with the changed conditions existing in the two dissimilar localities. No two ordinary minds could differ as to the characterization of the appellant's act in crossing the tracks with his back turned towards the approaching car. It was obviously negligent, if not reckless, to attempt such a thing. The result that was most likely to follow that conduct did happen, and the consequences must be borne by the person so guilty of incaution or heedlessness.

As all the other questions intended to be raised in the case are presented by the prayers which are not incorporated in the bill of exceptions, they cannot be considered. We think the court below was right in granting the instructions which withdrew the case from the consideration of the jury, and the judgment entered on the verdict in favor of the defendant must be affirmed.

Judgment affirmed, with costs above and below.

## CHICAGO &amp; A. R. Co. v. WILSON.

(Supreme Court of Illinois, Dec. 22, 1906. Rehearing Denied Feb. 8, 1907.)

[80 N. E. Rep. 56.]

**Death—Actions for Causing—Evidence—Due Care of Deceased—Railroads—Accident at Crossing.\***—In an action for death caused by being struck by a train at a crossing, where no one saw the accident, testimony as to the careful habits of the deceased was admissible to show due care on her part. •

**Municipal Corporations—Ordinances—Evidence of Enactment—Conclusiveness of Publication.**—Though City and Village Act (Hurd's Rev. St. 1905) § 65, makes a book or pamphlet of ordinances purporting to have been printed by authority of ordinances of a village board prima facie evidence of the legal passage and publication of the ordinance, such proof is not conclusive of these facts.

**Same—Sufficiency of Evidence.**—Evidence held not sufficient to disprove the passage of a published village ordinance, but merely to tend to show that the records of the village board were incorrectly kept.

**Same—Validity—Journal of Board—Effect of Errors.**—Where an ordinance was regularly passed, the fact that the journal of the village board incorrectly gave the date of its passage or the title of the chapter in which it was included does not render it invalid.

**Appeal—Review—Estoppel to Allege Error.**—Where, in a hearing before the court in the absence of the jury to determine the admissibility of certain ordinances in evidence, the plaintiff introduced oral testimony, and afterwards, before the jury, he renewed his offer of the ordinances, and defendant objected and offered in support of the objections "all the evidence heretofore offered to the court therein," defendant cannot complain on appeal of the admission of the oral testimony.

**Same—Decisions of Intermediate Courts.**—The judgment of the Appellate Court is conclusive in the Supreme Court on the questions of contributory negligence and excessive damages.

Appeal from Appellate Court, Second District.

Action by Hugh Wilson, administrator of Anna Wilson, against the Chicago & Alton Railroad Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

*J. L. O'Donnell and T. F. Donovan (Winston, Payne, & Strawn, of counsel), for appellant.*

*Charles F. Hansom and Browne & Wiley, for appellee.*

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\*See extensive note appended to *Tucker v. Boston & M. R. R.* (N. H.), 18 R. R. R. 294, 41 Am. & Eng. R. Cas., N. S., 294.



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WILKIN, J. This is an appeal from a judgment of the Appellate Court affirming a judgment of the circuit court of Grundy county in favor of appellee, against appellant, in an action on the case for wrongfully causing the death of the plaintiff's wife, Anna Wilson. The declaration consisted of four counts. The first charged defendant with running one of its passenger trains through the village of Braceville, in said county, and across its streets, at a dangerous rate of speed, whereby the deceased, while exercising due care in crossing the said railroad track on Main street, in the said village, was instantly killed. The second count charges the defendant with running a passenger train across said Main street without ringing a bell or sounding a whistle in approaching said crossing, as required by the statute, whereby the said Anna Wilson, while in the exercise of due care, was run over and killed. The third and fourth counts allege a violation of an ordinance of the village of Braceville by the defendant in running its train through said village at a greater rate of speed than permitted by said ordinance. The plea was not guilty and upon the trial before a jury judgment was rendered for the plaintiff. The verdict was for \$3,500, but \$500 of that amount was remitted, and judgment entered for the balance.

The defendant's railroad runs through the village of Braceville from northeast to southwest, crossing Main and Mitchell streets. The deceased lived on Main street, on the south side of the tracks, and on Saturday evening, October 24, 1903, she left her home and walked west on Main street, crossing the tracks, to a grocery store on the northeast corner of Main and Mitchell streets to purchase family provisions. After making the purchases she started back home, passing east along the north side of main street. About the time she left the store one of the defendant's trains, known as the "Kansas City Hummer," passed in a southwesterly direction. No one saw the train strike her, and it was not known that she had been killed until the next morning, when her body was found east of the track and about 75 feet south of the crossing. The evidence is conflicting as to the rate of speed at which the train was running at the time it crossed Main street, some of the plaintiff's witnesses fixing it at from 50 to 60 miles an hour, while the engineer in charge of the train swore that he was running about 35 or 40 miles per hour. The evidence as to whether any signal was given upon approaching the crossing is also contradictory. Several citizens who saw the train pass testify that no bell was rung nor whistle sounded, while the engineer and fireman testified to the contrary. The circumstances proved satisfactorily show that the deceased was killed by that evening train. There can be no doubt that the evidence upon these counts was amply sufficient to justify the court in refusing, at the instance of the defendant, to instruct the jury to find for it, nor that, in view of the conflict in the evidence on these counts, the judgment of the Appellate Court is final and conclusive in favor of the plaintiff.

The contention that evidence introduced on behalf of the

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plaintiff as to the careful habits of the deceased was incompetent and improperly admitted over the defendant's objection is without force. As we have already stated, no one witnessed the accident, and the testimony objected to was competent as tending to show that the deceased was at the time in the exercise of due care. Due care may be shown by circumstances as well as by direct testimony, and the fact that the deceased, at the time of the accident, was not guilty of negligence may be shown by her habits and by what are known to be the instincts of self-preservation in persons possessed of their natural faculties and who are ordinarily sober and careful of their personal safety. *Chicago, Gurlington & Quincy Railroad Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *Illinois Central Railroad Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435. It seems to be claimed on behalf of the appellant that the evidence of the engineer in charge of the train is to the effect that he saw the accident, and therefore the evidence introduced on behalf of the plaintiff as to the careful habits of the deceased became incompetent. At the time plaintiff's evidence was offered the engineer had not testified. If it was insisted that this evidence rendered that of plaintiff incompetent, counsel for defendant should have moved to exclude plaintiff's testimony, but this was not done. But the evidence of the engineer did not render the testimony incompetent. He did not claim to have seen the accident, but simply testified that he saw a woman approaching the crossing and saw her within a few feet of the east rail of the track, and that, upon sounding the alarm, she stopped, and that he did not know of her being struck, did not stop the train, and only heard of the fatal accident the next morning. We do not think the trial court was in error in admitting the testimony.

It is earnestly insisted on behalf of the appellant that the trial court erred in admitting in evidence proof of an ordinance of the village of Braceville regulating the speed of trains within its corporate limits. This proof on behalf of the plaintiff consisted of a book or pamphlet of ordinances purporting to have been printed by authority of the village board. Treating that proof as *prima facie* evidence of the passage and publication of the ordinance, the defendant attempted to overcome the same by introducing the journal of the proceedings of the village board. It is not denied, as we understand, that the proof offered by the plaintiff, under the provisions of section 65 of the city and village act (Hurd's Rev. St. 1905) was competent and in every way fulfilled the requirements of that section of the statute. Council for appellee insisted that such proof, not only proved *prima facie* the legal passage and publication of the ordinance but that such proof was conclusive and could not be contradicted by the defendant. In this we think they are in error. While the statute makes such proof competent, we do not understand that it may not be contradicted by other competent evidence showing that the ordinance was never, in fact, legally

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passed. The evidence seems to have been introduced in an irregular manner. It appears that, after the plaintiff had made his proof, as above stated, the jury were sent out and the defendant offered to the court proof to identify the journal of the proceedings of the village board and then offered that book in evidence, and especially pages 278 to 286, inclusive, showing proceedings at meetings of the village trustees on February 2 and February 9, 1885, which, it is claimed, shows that no meeting was held on February 4, 1885, and that the revised ordinances were adopted on February 2, 1885, and that chapter 30 thereof, as adopted, was upon the subject of rules, and not of railroads, as appeared from the printed book of ordinances. The journal shows a meeting of the village board convened on February 2, 1885, for the purpose of considering the revised ordinances; that all the members were present, and that a motion was carried to take up and adopt the ordinances chapter by chapter. It then gives the number of each chapter, beginning with chapter 1, and, in most instances, enumerates the number of each section in that chapter. It gives the yeas and nays upon the adoption of each chapter and shows each chapter adopted. In a few cases the number of sections in a chapter is not given. After the adoption of chapter 1 an adjournment to 1 o'clock is shown. There is no reference in this journal to chapter 15, but chapter 16 follows immediately after chapter 14, and the enumeration then proceeds in regular order. This makes the last chapter 39, whereas there are only chapters 1 to 38, inclusive, in the published book. But, as a matter of fact, there are only 38 chapters shown to have been adopted by the journal. The only case in which the journal shows the subject of the chapter is chapter 30, which, according to it, related to rules, while in the printed book chapter 30 relates to railroads and chapter 31 to rules. The number of sections in a chapter bearing a given number, as stated in the journal, does not always agree with the number of sections in the chapter bearing that number in the printed book. The error in omitting to number chapter 15 in the journal does not explain all the apparent discrepancies. At the close of the proceedings is a unanimous vote in favor of the report of the committee, which, fairly, means the adoption of the ordinances as an entirety. We think the Appellate Court properly held that the journal offered in evidence by the defendant did not disprove the passage of the ordinance, but, at most, merely tended to show that the records of the village board were incorrectly or carelessly kept, the burden being upon the appellant to overcome the prima facie case made by the plaintiff. It was not sufficient for it to merely cast doubt or suspicion upon the validity of the ordinance, but to disprove its validity by showing that, as a matter of fact, it was never passed. If regularly passed, the fact that the journal incorrectly gave the date of its passage or the title of the chapter in which it was included would not render it invalid.

Again, the village clerk, as shown by his testimony introduced before the court, shows that he had only been in office about one

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year, and while he testified that the book offered as the journal was the only record of the proceedings of the board of trustees, he also stated, on cross-examination, that he was not certain as to that fact, and it can readily be seen that, without a special examination of the books kept by his predecessor or predecessors, he would have no more knowledge as to whether the journal in question was the only record of the proceedings than would any other person, and he testified that he had made no such examination. Section 11 of article 6 of the city and village act provides that the clerk shall record, in a book to be kept for that purpose, all ordinances passed by the board of trustee, and, at the foot of the record, on each ordinance so recorded, he shall make a memorandum of the date of the passage and of the publication or posting of such ordinance, which record and memorandum, or certified copy thereof, shall be prima facie evidence of the passage and legal publication or posting of such ordinances for all purposes whatsoever. There is an entire absence in this record of proof of a failure of the clerk to comply with this provision of the statute, and the presumption must be that he did his duty and recorded the ordinance as passed. If he performed his duty in that regard his certificate would be prima facie evidence of the passage of the ordinances. The proof, therefore, introduced before the court did not show that the revised ordinances as published were not passed as shown in the pamphlet introduced in evidence by the plaintiff.

The method of introducing the evidence on this question was peculiar. As heretofore stated, all the proof offered by the defendant was to the court, out of the hearing of the jury. During that hearing before the court certain oral testimony was offered by the plaintiff to explain the passage of the ordinance and the apparent contradiction in dates, numbers, and titles of the chapters of the ordinances. This testimony, in part at least, if it had been admitted to the jury by the plaintiff over the objection of the defendant, would have been incompetent, though, in so far as it did not contradict the record, but simply explained it, it may not have been objectionable. But, aside from the consideration of that question of its competency, after the jury were returned into court and the plaintiff renewed his offer of the book of ordinances, the defendant renewed its objection, and the abstract recites that it, "in support of the objections, offers all the evidence heretofore offered to the court therein," so that, if the oral testimony went to the jury at all, it must have been at the instance of the defendant, and it cannot, therefore, now object. However, that testimony, in any view of the case, was not of such controlling importance as that it ought to work a reversal of the judgment below.

The circuit and appellate courts did not commit error in holding that plaintiff proved the passage and publication of the ordinance regulating the speed of trains through the village, and that the defendant failed to overcome that proof, and that no reversible error was committed in the admission of oral testimony.

**Duffy v. Atlantic & N. C. R. Co**

Some objection was made in the Appellate Court of the ruling of the trial court in admitting in evidence on behalf of the plaintiff certain photographs, but that objection does not seem to be renewed here.

The contentions that the evidence shows that the deceased was guilty of contributory negligence, and that the damages allowed are excessive, cannot be considered in this court. The judgment of the Appellate Court is final as to these facts.

We have discovered no reversible error in this record, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed

FARMER and VICKERS, JJ., took no part in the decision of this case.

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**DUFFY v. ATLANTIC & N. C. R. Co. et al.**

(Supreme Court of North Carolina, Feb. 26, 1907.)

[56 S. E. Rep. 557.]

**Railroads—Highways—Obstructing Highway—Injuries to Driver of Vehicle—Negligence.**—The mere fact that defendant railroad's train was standing across a public street and obstructing the same, so that plaintiff was obliged to turn the runaway horse he was driving out into an alley before reaching the train, in doing which his vehicle was overturned and he was injured, did not of itself constitute negligence.

**Same—Railroad Crossing—Rights of Traveler.\***—Where a railroad track crosses a public highway, both a traveler and the railroad have equal rights to cross, but the traveler must yield the right of way to the railroad company in the ordinary course of the latter's business.

**Same.**—A railroad company unlawfully and unnecessarily blocking up and obstructing a public street, as a direct consequence whereof the driver of a vehicle drawn by a runaway horse was unable to pass, and, in attempting to turn out, was thrown from the vehicle and injured, was guilty of negligence.

**Same—Evidence—Burden of Proof—Proximate Cause.†**—In an action against a railroad, the burden was on plaintiff to show that defendant unnecessarily and wrongfully obstructed a public street, and that as the proximate cause thereof plaintiff, in attempting to turn aside the runaway horse he was driving, was thrown from his vehicle and injured.

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\*For the authorities in this series on the question whether there may be a recovery for injuries sustained in an attempt to cross a railroad track in front of a train or car which was seen by the party to be approaching before he made such attempt, see foot-notes appended to *Cranch v. Brooklyn Heights R. Co.* (N. Y.), 21 R. R. R. 610, 44 Am. & Eng. R. Cas., N. S., 610.

†See foot-note appended to *Kearns v. Southern Ry. Co.* (N. Car.), 21 R. R. R. 848, 44 Am. & Eng. R. Cas., N. S., 848.



*Duffy v. Atlantic & N. C. R. Co*

Appeal from Superior Court, Craven County; Shaw, Judge.

Action by R. L. Duffy against the Atlantic & North Carolina Railroad Company and another. Judgment for defendants, and plaintiff appeals. Reversed.

*D. L. Ward* and *R. B. Nixon*, for appellant.  
*Simmons, Ward & Allen*, for appellees.

BROWN, J. The portion of the complaint material to be considered on this appeal states, in substance, that on the 10th of March, 1906, the plaintiff was driving along the macadamized road in the city of New Bern when his horse became frightened and began to run. The horse ran for some distance, and when the plaintiff turned a corner in the street and came within one block of the railroad crossing, he saw that the defendants had a long freight train standing across the street which made it impossible for him to pass. He alleges that the freight train was unnecessarily there, and had been there for a long time, across the street, and extended for some distance on either side of the street, so that he could not pass. He had either to run into the train or attempt to turn out into an alley just before reaching the train, which was the only outlet he had. In attempting to turn his buggy was overturned, and plaintiff was seriously injured as set out in his complaint.

While the use of the public highways and streets belongs to the public by common right, we fully agree with the learned counsel for the defendant that the fact that the defendant company's train was at this particular time obstructing the highway does not in itself, constitute negligence. The railroad company has a right on its roadway to move its locomotives, with or without cars attached, to and fro, in making up its trains, shifting its cars from one train to another, and to stop its trains when necessary in the ordinary course of such work. And any harm sustained by reason of such shifting and stopping is *damnum absque injuria*. *Morgan v. Railroad*, 98 N. C. 247, 3 S. E. 506. Neither do we gainsay the proposition that where a railroad track crosses a public highway, both a traveler and the railroad company have equal rights to cross, but the traveler must yield the right of way to the railroad company in the ordinary course of its business. But the gravamen of this plaintiff's complaint is "that the said defendants unlawfully, wrongfully, and unnecessarily blocked up and obstructed the said street for a long time prior and subsequent to the time when plaintiff approached it as aforesaid," and that the direct consequence of such wrongful obstruction was the injury of the plaintiff. If true, this constitutes negligence. *Morgan v. Railroad*, *supra*; *Harrell v. Railroad*, 110 N. C. 215, 14 S. E. 687; *Dunn v. Railroad*, 124 N. C. 252, 32 S. E. 711. The burden of proof will, of course, be on plaintiff to establish such unnecessary and wrongful obstruction of the street, and that it was the immediate or proximate cause of the injury.



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The defense of contributory negligence must be set up in the answer, as we find no facts stated in the complaint which, as a matter of law, constitute contributory negligence.

The defendant will answer over.

The judgment of the superior court is reversed.

**MATTES v. GREAT NORTHERN RY. CO.**

(Supreme Court of Minnesota, Jan. 4, 1907.)

[110 N. W. Rep. 98.]

**Railroads—Injury to Child on Track—Question for Jury.\***—Former decision in this case, 104 N. W. 234, 95 Minn. 386, to the effect that defendant's shopyards came within the scope of the statute requiring railroad companies to fence their roads, and that whether the yards in question could be fenced, including the construction of necessary cattle guards, without materially impairing their usefulness, was a question of fact for the jury to determine, followed and applied.

**Same—Failure to Fence—Cattle Guards.†**—The rule laid down in *Rosse v. Railway Co.*, 71 N. W. 20, 68 Minn. 216, 37 L. R. A. 591, 61 Am. St. Rep. 472, to the effect that the railroad fence statute was designed to prevent children, as well as animals, from entering upon railroad tracks, held to apply to cattle guards constructed as a part of the fence.

**Same—Evidence.**—Evidence held to sustain the verdict.

(Syllabus by the Court.)

Appeal from District Court, Stearnes County; D. B. Searle and Homer B. Dibell, Judges.

Action by Stephen Mattes, administrator of Alois S. Mattes, against the Great Northern Railway Company. Verdict for plaintiff. From an order denying motion for judgment, notwithstanding the verdict, defendant appeals. Affirmed.

*M. L. Countryman and Geo. H. Reynolds*, for appellant.  
*Bruener & Klasen and J. D. Sullivan*, for respondent.

BROWN, J. This cause was here on a former appeal. 95 Minn. 386, 104 N. W. 234. On the first trial, the court directed a verdict for defendant, at the close of plaintiff's evidence, and the latter appealed from an order denying his motion for a new trial. We held on that appeal that the evidence presented a case for the

\*See foot-notes appended to *Bird v. Michigan Cent. R. Co.* (Mich.), 21 R. R. R. 622, 44 Am. & Eng. R. Cas., N. S., 622.

†For the authorities in this series on the subject of the liability of railroad companies for injuries to children as affected by failure to fence their tracks, see foot-notes appended to *Dalin v. Worcester Con. St. Ry. Co.* (Mass.), 16 R. R. R. 476, 39 Am. & Eng. R. Cas., N. S., 476; foot-notes appended to *Paquin v. Wisconsin Cent. Ry. Co.* (Minn.), 21 R. R. R. 639, 44 Am. & Eng. R. Cas., N. S., 639.

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jury on the several issues raised by the pleadings, and remanded the cause for a new trial. The second trial resulted in a verdict for plaintiff for \$1,000, and defendant appeals from an order denying its motion for judgment notwithstanding the verdict. Reference to the former opinion is here made for an understanding of the facts. It is unnecessary to restate them in this opinion.

We follow the former decision to the effect that the statutes imposing upon railroad companies the obligation to fence their roads apply to the repair shops and yards in question; and hold, upon the evidence on this appeal, that the question whether it was practicable to fence them, without materially impairing the usefulness of the yards, was for the jury to determine. The court did not, as we read the charge, say to the jury that it was incumbent upon defendant to fence the entire tract of land upon which the yards were located, but instead, that such a fence would have been a compliance with the statute, and this at defendant's request, leaving them to say whether a fence encircling the yards was practicable. By their verdict for plaintiff, the conclusion that it was practicable must be taken as finally settled, and this applies not only to the fence proper, but to the cattle guards necessary to be constructed at the highway extending across the lead track to the west of the various side tracks. The neglect of defendant to comply with the statutes on this subject was evidence of negligence, sufficient to take the case to the jury, and, unless one or both of the contentions—(1) that the absence of the fence and cattle guards was not the proximate cause of the death of plaintiff's intestate, and (2) that plaintiff was guilty of contributory negligence—be resolved in defendant's favor, the verdict must be sustained.

It is insisted in this connection, with much earnestness, that cattle guards at the highway intersecting the lead track at the west end of the yards, had they been constructed, would not, in any other than an imaginary view, have prevented the boys from going upon the railroad tracks; that defendant's failure to construct them was not, therefore, the proximate cause of the accident, and we are urged to so hold as a matter of law. We are unable to distinguish, from the standpoint of effectiveness as a barrier to young children, between cattle guards and an ordinary right of way fence. Neither will absolutely obstruct or prevent entrance upon the railroad grounds. Their character and structure, so far as effectiveness is concerned, will not warrant the court in saying, as a matter of law, that either would or would not answer the purpose intended by the statute. Children may pass over or under the cattle guards without difficulty, and with equal facility climb over or crawl under the fence, but either might have the effect of turning them away. The case in this particular is controlled by *Rosse v. Railway Co.*, 68 Minn. 216, 71 N. W. 20, 37 L. R. A. 591, 64 Am. St. Rep. 472. We also follow the case of *Ellington v. Railway Co.*, 96 Minn. 176, 104 N. W. 827, to the effect that the question whether, had defendant performed its duty in this respect, the children of plain-

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tiff would have been prevented from going upon the yard grounds, was a question of fact for the jury to determine. If the yards had been fenced with proper cattle guards at the highway intersection, they would have been completely inclosed, and it is unnecessary to consider whether the boys entered at the place where the cattle guards should have been constructed, or at some other place.

It is further contended that plaintiff, father of the boys, was guilty of contributory negligence in sending his children upon the railroad land for the purpose of herding cattle, knowing of the proximity of the railroad tracks and repair shops. The evidence on the question is substantially like that presented on the former appeal, and we follow the decision there made. The land upon which the shops are located consists of a tract of about 125 acres, unfenced, to which the people in the vicinity had resorted for a number of years for various purposes—picnics, baseball, herding cattle, etc., and this without objection from the railroad company. Plaintiff's boys were herding cattle upon the land with his knowledge—perhaps he had sent them there for that purpose—not upon the shop yards, however, but upon the unoccupied land in the vicinity. It occurs to us that it would be going far beyond reason to say that plaintiff was guilty of contributory negligence, either in permitting or sending the boys, under the circumstances disclosed, to herd cattle upon this tract of land, even though he knew of the fact that the yards and shops were unfenced. The case is clearly distinguishable from *Ellington v. Railway Co.*, 96 Minn. 176, 104 N. W. 827. In that case, it appeared that the parents sent their child across the tracks and right of way on an errand, and he was killed while complying with their directions. There is a marked difference between sending young children upon or across railroad tracks, upon which trains are frequently operated, and sending them to herd cattle upon vacant and unoccupied land adjacent to such tracks. Nor does the ownership of the land adjoining the yards effect the question in the case before us, for the fact remains that defendant did not send his boys upon the yards, and the record contains no suggestion that he knew that they were in the habit of frequenting the same, if such were the fact. Again, there is no evidence in the case to sustain the contention that at the time the boys were killed they were engaged in the work of herding cattle at or near the shopyards. They started from home at the noon hour with their herd, down the highway to the river, a considerable distance from the yard tracks, and were not thereafter seen with the cattle by any one. At about 5 o'clock in the afternoon they were found dead, alongside one of the tracks, by a railroad employee, and at that time no cattle were about or in the vicinity. In connection with this situation, counsel for defendant requested the court to instruct the jury, and it did so, that "there being no evidence as to where any of the cattle were at the time the boys went on defendant's premises," the jury could not find that "they went there to herd or look after the cattle." If the evidence so conclusively established that

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fact, the instructions of the court, given at defendant's request, wholly eliminated the question of plaintiff's contributory negligence in sending the boys upon the railroad land. They were not upon the yards herding cattle, nor in the discharge of any duty owing to, nor in compliance with any directions of, plaintiff at the time of their death, as was the fact in the Ellington Case.

Neither is the evidence conclusive that plaintiff had surrendered his guardianship and control of the younger boy by permitting or sending him with his older brother on this occasion, and is consequently precluded from recovery because of the negligence of the latter in taking him upon the railroad grounds. This question was disposed of on the former appeal, and we adhere to the decision there made.

Upon all of these questions, the evidence fairly made a case for the jury, and their verdict is sustained; at least, the evidence is not so far conclusive in favor of any of defendant's contentions as to justify this court in granting final judgment on the merits of the case in its favor.

For these reasons, the order denying the motion for judgment is affirmed.

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**MAYSVILLE & B. S. R. Co. *et al.* v. McCABE'S ADM'R.**

(Court of Appeals of Kentucky, March 1, 1907.)

[100 S. W. Rep. 219.]

**Railroads—Crossing Accidents—Action—Instructions.\***—In an action against a railroad for the death of one run over by a train in a street, plaintiff's evidence tended to show that the train was being run at a rate of from 25 to 40 miles an hour, that the defendant maintained a double track at the place in question, and that the train approached behind him on the track on which he was not walking. Held proper to instruct that if decedent was placed suddenly and unexpectedly in a dangerous position, or what appeared to him to be such, by failure of defendant to give reasonable warning of the approach of the train, or by the running of the train at a rate of speed greater than the law would allow, he was not guilty of contributory negligence, if he did not adopt the best means of escape, but made an error of judgment as to the best course to pursue, but that all that was required of him, under such circumstances, was to act as a person of ordinary judgment and prudence would have done.

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\*For the authorities in this series on the question whether error of judgment, caused by fear, in avoiding danger, constitutes contributory negligence, see foot-notes appended to *Alabama Great Southern R. Co. v. Fulton* (Ala.), 20 R. R. R. 311, 43 Am. & Eng. R. Cas., N. S., 311; foot-notes appended to *Root v. Kansas City S. Ry. Co.* (Mo.), 20 R. R. R. 171, 43 Am. & Eng. R. Cas., N. S., 171; foot-notes appended to *Firebaugh v. Seattle Electric Co.* (Wash.), 19 R. R. R. 107, 42 Am. & Eng. R. Cas., N. S., 107.

**Maysville, etc., R. Co. v. McCabe's Adm'r**

Appeal from Circuit Court, Mason County.

"Not to be officially reported."

Action by Peter McCabe's administratrix against the Maysville & Big Sandy Railroad Company and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

*Worthington & Cochran* and *W. H. Wadsworth*, for appellants.  
*A. D. Cole*, for appellee.

BARKER, J. This is the third appeal of this case. After it was instituted, the defendants filed a petition under the federal statute to remove it to the federal court, on the ground of diversity of citizenship, and this motion was sustained by the circuit court. From the order of transfer the plaintiff appealed, and the judgment was reversed, and the cause sent back for trial. The opinion on the first appeal is to be found in 66 S. W. 1054, 23 Ky. Law. Rep. 2328. Upon the return of the case, a trial was had on the merits, with the result that at the close of all the testimony a motion for a peremptory instruction to the jury to find in defendant's favor was sustained. From this judgment the plaintiff prosecuted a second appeal, and it was reversed for reasons given in an opinion to be found in 89 S. W. 683, 28 Ky. Law. Rep. 536. Upon the return of the case to the circuit court for proceedings consistent with the opinion, a trial was again had on the merits, with the result that the jury returned a verdict in favor of the plaintiff, (appellee) for \$2,500, and from the judgment based upon this verdict the defendants (appellants) appeal. The full statement of the facts in the former opinion on the merits renders it unnecessary that we should give a detailed statement of them here.

The appellants now insist that the facts elicited upon the last trial were substantially different from those shown on the preceding one, and that they were entitled to a peremptory instruction to the jury to find for them. To this conclusion we cannot agree. A careful reading of the evidence adduced on both trials convinces us that, if there was any difference in appellants' right to a peremptory instruction on the trials had on the merits, it was in favor of the first, rather than the last. In other words, the evidence in favor of the right of plaintiff to submit her case to the jury, if there was any difference, was stronger upon the last trial than upon the one which preceded it. Having decided on the preceding appeal that the evidence adduced in favor of the plaintiff entitled her to go to the jury, this question (the facts being substantially the same) is settled for the purposes of this appeal, and we cannot therefore enter into a discussion now as to whether or not that conclusion was right or wrong.

Before the second trial, appellants pleaded the transfer of the case to the federal court and its exclusive jurisdiction to try the issues between them and the plaintiff in bar of a further prosecution of the case in the state court. This plea was held bad by the trial court, and the ruling was correct. The question was neces-

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sarily involved on the appeal from the order of transfer, for, if the state court lost its jurisdiction of the case by the erroneous order of transfer, the judgment making it should not have been reversed. The reversal of the order of transfer necessarily adjudicated the question now sought to be made by the plea under discussion, and the matter is now open for retrial.

The only serious criticism of the instructions given by the court is directed to No. 3, which is as follows: "The court further instructs the jury that if they believe from all the evidence that the deceased, Peter McCabe, was, on the date of the accident, placed suddenly and unexpectedly in a dangerous position, or what to him reasonably appeared to be a dangerous position, if he was so placed, and was so placed by the failure of the defendants, their agents and servants, to give reasonable warning of the approach of the train, or by their running said train substantially at a rate of speed greater than ordinary care for the safety of others would allow, then he was not guilty of contributory negligence, if he did not adopt the best means of escape, but made an error of judgment as to the best course to pursue; all that was required of him, under the circumstances, if it was under such circumstances he acted, being to act as a person of ordinary judgment and prudence would have done, if placed in the same situation." We think this instruction substantially gave the law of the issue to which it was directed. The evidence of the plaintiff tended to show that the train which killed the decedent was being run through one of the streets of Maysville at a rate of from 25 to 40 miles an hour. The company maintained a double track along the streets upon which the decedent was walking just before he was hurt. The train was approaching behind him on the track upon which he was not walking, and while it may be conceded that he saw it before it reached him, and that he was safe if he remained where he then was, yet, if it was coming at the very unreasonable rate of from 25 to 40 miles an hour, this of itself was calculated to so perturb and frighten the old man as to make it impossible for him to tell whether he was on the track upon which the train was coming, or not; and, if in his great confusion and fright he rushed from a place of safety into one of danger, this act could not be considered contributory negligence. The track being in the public highway of a city, the decedent was not a trespasser. When he saw the train coming, he had a right to assume that it would approach at a proper rate, and, if it had been running at a reasonable rate, he probably could have reached the crossing in time to leave the track in safety. It is a matter of common knowledge that one standing immediately in front of a coming train can tell nothing of its rate of speed until it comes quite close. Now, when the decedent saw the train approaching, he being immediately in front of it, and unable to judge its rate of speed, had a right to suppose that it was coming at a reasonable rate through one of the public thoroughfares of the city. But if, when it came close, he ascertained that it was coming at so furious a rate that he was in great danger of being run over, it was not



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unnatural that he should be thrown into such a state of nervous fright as to be incapable of judging what he should do to reach a place of safety. The question whether the decedent was so frightened by the supposed furious rate of speed at which the train was being run that he was rendered incapable of selecting a place of safety, was one which the appellee had a right to submit to the jury. And this phase of the case comes within the reasoning of *South Covington & Cincinnati Street Railway Co. v. Ware*, 84 Ky. 267, 1 S. W. 493, and the instruction complained of, which presented it to the jury, is supported by the opinion delivered in that case.

Upon the whole case, we are able to perceive no substantial error in the record, and the judgment is therefore affirmed.

**WRIGHT v. BOSTON & M. R. R.**

(Supreme Court of New Hampshire, Hillsborough, Jan. 1, 1907.)

[65 Atl. Rep. 687.]

**Railroads—Accident at Crossing—Negligence—Contributory Negligence—Burden of Proof.\***—Where, in an action for death of a traveler at a crossing, there was active participation by decedent in bringing about the dangerous situation resulting in his death, and the duty rested on him as well as on defendant of actively exercising ordinary care, the absence of evidence of what he did at the time cannot be supplied by conjecture or by the theory that the instinct of self-preservation was evidence that his acts were those of an ordinarily prudent person.

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\*For the authorities in this series on the question whether there is a presumption of due care on the part of a person killed by a train or street car, see foot-notes appended to *Eckhard v. St. Louis Transit Co.* (Mo.), 21 R. R. R. 831, 44 Am. & Eng. R. Cas., N. S., 831; foot-notes appended to *Adams v. Boston & N. St. Ry. Co.* (Mass.), 21 R. R. R. 70, 44 Am. & Eng. R. Cas., N. S., 70; foot-notes appended to *Hanna v. Philadelphia & R. Ry. Co.* (Pa.), 19 R. R. R. 819, 42 Am. & Eng. R. Cas., N. S., 819; *Carlson v. Chicago & N. W. Ry. Co.* (Minn.), 19 R. R. R. 208, 42 Am. & Eng. R. Cas., N. S., 208; foot-notes appended to *Rietveld v. Wabash R. Co.* (Iowa), 19 R. R. R. 181, 42 Am. & Eng. R. Cas., N. S., 181; *Ryan v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 775, 41 Am. & Eng. R. Cas., N. S., 775; *Gorham v. Milford, etc., Ry. Co.* (Mass.), 18 R. R. R. 745, 41 Am. & Eng. R. Cas., N. S., 745; *Looney v. Metropolitan R. Co.* (U. S.), 18 R. R. R. 617, 41 Am. & Eng. R. Cas., N. S., 617; foot-notes appended to *Donaldson v. New York, etc., R. Co.* (Mass.), 18 R. R. R. 424, 41 Am. & Eng. R. Cas., N. S., 424.

For the authorities in this series on the subject of the effect of the presumption of the exercise of due care by a person killed by a train or car, see foot-notes appended to *Powers v. Pere Marquette R. Co.* (Mich.), 20 R. R. R. 559, 43 Am. & Eng. R. Cas., N. S., 559; foot-notes appended to *Carlson v. Chicago & N. W. Ry. Co.* (Minn.), 19 R. R. R. 208, 42 Am. & Eng. R. Cas., N. S., 208.

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**Same—Contributory Negligence—Burden of Proof.**†—In an action against a railway company for the death of a pedestrian in a collision with a train at a crossing, plaintiff must prove, not only that the railroad was guilty of negligence, but that decedent was free from contributory negligence.

**Same—Evidence—Sufficiency.**—A plaintiff suing a railroad for the death of a pedestrian struck by a train at a crossing does not prove decedent's freedom from contributory negligence by presenting no evidence thereon and relying on decedent's instinct of self-preservation as proof that he exercised due care.

**Negligence — Evidence — Admissibility.**—Where the question is whether one exercised ordinary care to avoid injury to himself, proof of what men in general would have done under similar circumstances is inadmissible.

**Same—Burden of Proof.**—A party having the burden of presenting evidence of the fact that one exercised ordinary care does not prove it, in the absence of direct evidence, by a legal presumption arising from the fact that an ordinarily prudent man would have exercised ordinary care under the circumstances.

**Railroads—Injuries to Pedestrian at Crossing—Contributory Negligence.**—In an action against a railroad for the death of a pedestrian struck by a train at a crossing, the evidence showed that decedent attempted to pass over the tracks at a street crossing where there were three tracks; that just before the accident he was seen by a witness who was approaching the crossing from the opposite side; and that the pedestrian had then passed the first track and was walking towards the witness who saw an engine and a single car approaching on the third track and waited for it to pass, and that after it had passed she did not see the pedestrian, who was killed at the crossing. The railroad had no flagman at the crossing, and the bell was not rung nor the whistle blown before the engine reached the crossing. The view of the track was somewhat obstructed by cars. Held not to show that decedent was free from contributory negligence, essential to a recovery.

Exceptions from Superior Court, Hillsborough County.

Action by Jennie M. Wright, administratrix of H. C. Wright, deceased, against the Boston & Maine Railroad. There was a verdict for the plaintiff, and defendants except. Transferred to Supreme Court. Exceptions sustained.

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†For the authorities in this series on the question whether it is to be presumed that a person stopped, looked and listened before attempting to cross street railway tracks, see foot-notes appended to *Coolbroth v. Pennsylvania R. Co. (Pa.)*, 13 R. R. R. 419, 36 Am. & Eng. R. Cas., N. S., 419; foot-notes appended to *Carlson v. Chicago & N. W. Ry. Co. (Minn.)*, 19 R. R. R. 208, 42 Am. & Eng. R. Cas., N. S., 208.

For the authorities in this series on the question whether a presumption of negligence on the part of those in charge of the train or car arises from the fact that a person is injured at a railroad crossing, see foot-notes appended to *Kearns v. Southern Ry. Co. (N. Car.)*, 21 R. R. R. 848, 44 Am. & Eng. R. Cas., N. S., 848.

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There was evidence tending to prove the following facts: On March 3, 1905, at about 9 o'clock in the evening, Wright, who was on foot and alone, attempted to pass over the defendants' track at the Elm street crossing, where there are three tracks running east and west. Just before the accident Wright was seen by a woman who was approaching the crossing from the opposite side, and he had then passed over the first track and was walking toward her. She saw an engine and a single car approaching on the third track—the one nearest her—and waited for it to pass. After it had passed she did not see Wright, who was evidently killed by the engine at the crossing. There was also evidence tending to show negligence on the part of the defendants in not having a flagman at the crossing, and in not ringing the bell or blowing the whistle before the engine reached the crossing. It was also claimed by the plaintiff that the view of the track was somewhat obstructed by cars. The defendants' motion for a non-suit was denied, subject to exception.

*Doyle & Lucier and Wason & Moran*, for plaintiff.

*Burns & Burns and Hamblett & Spring*, for defendants.

WALKER, J. In *Huntress v. Railroad*, 66 N. H. 185, 190, 34 Atl. 154, 49 Am. St. Rep. 600, the court say: "A person of ordinary prudence, exercising the caution and vigilance which the law has adopted as the test of duty, might make an extremely hazardous attempt to cross a railroad in front of a train. From the mere fact of great danger, it does not necessarily follow that he exposed himself recklessly and consciously. When there is no evidence of insanity, intoxication, or suicidal purpose, and no evidence on the question of his care, except the instinct provided for the preservation of animal life, it may be inferred from the circumstantial proof that, for some reason consistent with ordinary care and freedom from fault on his part, his attempt to cross was due to his inadequate understanding of the risk." The argument seems to be that, because a man may, while in the exercise of ordinary care and while governed by an instinctive desire to avoid danger, attempt to do a very dangerous thing, it may be found by the jury as a fact that a particular man killed at a railroad crossing was not negligent. That reasoning applied to this case would justify the jury in concluding that the deceased saw the approaching engine, and, for some undisclosed and, in fact, undiscoverable reason, consistent with ordinary care, attempted to cross the track in front of it. Granting that that may possibly be the explanation of the cause of his fatality, is it not just as probable that it was due to acts on his part not consistent with ordinary care? It may be that he miscalculated the speed of the engine or its distance from him, or it may be that, without such miscalculation, he decided to incur the hazard and trust to his agility to carry him safely over. In short, he may have been negligent, or he may not have been. The natural desire to avoid pain, suffering, and death may have caused him to take a view of the situation when he was in a place of safety, and

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it may have prevented him from hurling himself directly in front of the engine, but it did not necessarily invest him with all the qualities of an ordinary careful man in deciding whether it was prudent to cross in front of the train—it did not urge him, when in a place of safety, to attempt to cross when he saw the train approaching. No emergency had arisen which threatened him with peril. If he had found himself in a perilous situation, his acts might be justified, though they were dangerous and ill advised. *Folsom v. Railroad*, 68 N. H. 454, 38 Atl. 209. But he was not in such a situation. Until he stepped upon the third track, he knew, if he saw the train, that he was in no peril. He knew that he was perfectly safe if he remained there until after the train passed. *Central of Georgia Ry. v. Foshee*, 125 Ala. 199, 215, 27 South. 1006. There was nothing urging him to cross. It does not appear that his business was of an urgent character requiring great haste and expedition, or that there was any excuse for his hazardous attempt. The instinct of self-preservation would have suggested delay in a safe position, instead of haste to get into an unsafe one.

When it is said that he may have miscalculated the distance and speed of the train, caused in part by the omission to ring the bell, it is sufficient to reply that, in the absence of the fact, he may have realized the nearness of the train and attempted to prove his fleetness by running onto the track in front of it. This is not equivalent to the saying that he may have “recklessly and consciously” jumped upon the track. His natural desire to protect himself from harm would probably prevent him from consciously committing suicide, while it would not prevent him from negligently attempting to cross the track. If negligence were the willful, conscious recklessness of a man in a given situation, the desire to protect life and limb might constitute sufficient evidence, in the absence of all direct affirmative evidence, that he was not negligent. “Doubtless the jury might infer that the deceased was governed by the natural instinct of self-preservation, and would not put himself recklessly and consciously in peril of death, but that men are careless and subject themselves thereby to injury is the common experience of mankind, and when injured, no presumption exists in the absence of proof that they were exercising due care at the time.” *Reynolds v. Railroad*, 58 N. Y. 248, 252. It may be conceded that it is a well-nigh universal characteristic of human nature that men have an instinctive impulse to avoid physical pain and death, but it must be remembered that neither this, nor any other universal instinct, prevents them from being careless. Very few men intelligently seek death, but very many are guilty of negligence leading to fatal results. If the question in this case were whether the deceased consciously threw himself upon the track or wished to commit suicide, it might be legitimate to infer that he did not knowingly seek that fatality. But because that may be a proper deduction, it does not follow that he also used ordinary

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care, or was not negligent, in seeking to preserve his life while running across the track in front of the engine. His purpose undoubtedly was to get across in safety. The attempt may have been a foolhardy one, one of which the ordinary prudent man would not have been guilty, and still it may not have involved the element of conscious recklessness. As before suggested, he may have trusted in his agility to preserve him from being overtaken by the locomotive. In short, he may have been negligent without being willfully reckless. Hence it follows that, while the instinct of self-preservation may be evidence that he did not willfully commit suicide, it does not prove that he was not negligent. To say that he miscalculated the nearness of the engine, because some men have made that mistake, is to give the plaintiff the benefit of pure speculation as evidence of his careful conduct. It is no more probable that he observed the locomotive and estimated that he had sufficient time to safely cross to the opposite side of the track, than that he was lost in reverie, or for some other reason did not see, or try to see, whether a train was approaching, or that, having observed the engine, he negligently took the chance of getting across in front of it. If men in general do not go upon railroad grade crossings without ascertaining in some way whether a train is approaching, they do not, after having ascertained that it is approaching, attempt to protect themselves from personal injury by rushing in front of it, upon a hasty calculation of chances as to its speed or nearness. The great majority of men do not try experiments of that character; consequently, the great majority of men are not maimed or killed while attempting to cross railroad tracks in front of approaching trains. Such fatalities are comparatively rare, and that fact, so far as it authorizes any inference in a given case as to the care exercised by the deceased, does not show that he was in the exercise of that degree of care which ordinarily prudent men exercise under similar circumstances. Though prudent men sometimes expose themselves to danger through mistakes of judgment, it cannot be inferred in all cases that such is the explanation of their conduct when the evidence is wholly silent upon the subject. In such a case, it is pure conjecture whether the deceased exercised the care of an ordinarily prudent man to avoid the fatal catastrophe, or whether he did not. The only possible solution of the question depends upon a mere calculation of chances. One answer is as liable to be right as the other. He may have been reasonably careful, or he may have been unreasonably careless. Which alternative is the more probable is susceptible of no proof, and can be only tentatively ascertained by the merest guessing. A man who is ordinarily prudent may, in a particular instance, be negligent.

In some cases the deceased's care may be reasonably inferred or found from the circumstances attending the accident. When a passenger, for instance, seated in a passenger car, is killed by a collision with another train, little doubt can be entertained that he is in the exercise of due care, and in an action by his admin-



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istrator no further evidence upon that point would be required in the first instance. Other similar illustrations might be suggested, indicating conclusively that the care required of the plaintiff in an action for negligence may be proved by circumstantial evidence; that direct affirmative proof may be dispensed with when, upon the competent evidence, reasonable men, exercising their judgment upon the subject, could say from the manner in which the injuries were inflicted that it is more probable than otherwise that the deceased was in the exercise of due care, or that no amount of care on his part would have prevented his injury. "It is well settled in cases of this character that direct affirmative evidence that the plaintiff was exercising due care is not necessary; it may be inferred from all the circumstances attending the accident and from the lack of evidence indicating carelessness on his part." *Stevens v. Company*, 73 N. H. 159, 173, 60 Atl. 855 (70 L. R. A. 119). In *Lyman v. Railroad*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364, the motion for a nonsuit was denied because there was evidence that the deceased, who was attempting to cross the track riding on a horserake, had before taken special precautions to protect himself from injury at this crossing, and it was held that this fact was evidence from which it might be inferred he was exercising due care at the time of the accident. Besides, the circumstance that he was driving a horse would have a material bearing upon the question of his care (*Folsom v. Railroad*, 68 N. H. 454, 460, 38 Atl. 209), while a person on foot about to cross a track has no forces to control except his own voluntary and intelligent actions. The decision in *Lyman v. Railroad* does not hold that the instinct of self-preservation alone is sufficient evidence that the deceased was careful or not negligent, for it was unnecessary to so hold. When it is said that a person's careful conduct may be inferred from the circumstances, it is not intended to announce the doctrine that the jury may find the fact by guessing. The circumstances must be logically such that the jury may deduce the fact from them by some process of human reasoning, and in all analogous cases in this state some special circumstances have appeared from which reasonable men might logically find the fact of due care. With the possible exception of *Huntress v. Railroad*, *supra*, no case has been put on the ground of the instinct of self-preservation. Some evidence of care, either direct or indirect, has appeared when it has been held that the plaintiff sustained the burden of disproving contributory negligence. See *Nutter v. Railroad*, 60 N. H. 483; *Evans v. Railroad*, 66 N. H. 194, 21 Atl. 105; *Lyman v. Railroad*, *supra*; *Davis v. Railroad*, 68 N. H. 247, 44 Atl. 388; *Folsom v. Railroad*, 68 N. H. 454, 38 Atl. 209; *Smith v. Railroad*, 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596; *Gahagan v. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Waldron v. Railroad*, 71 N. H. 362, 52 Atl. 443; *Tucker v. Railroad*, 73 N. H. 132, 59 Atl. 943; *Brown v. Railroad*, 73 N. H. 568, 64 Atl. 194. It is at least significant that the court, in denying the motion for a nonsuit in cases where the plaintiff's



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vigor or force. Thompson (2 Com. Neg. §§ 1622, 1623), in discussing this question, recognizes that the presumption of right-acting on the part of a plaintiff does not apply in jurisdictions where the burden of showing carefulness is on the plaintiff, and he says (section 1623): "We may conclude this discussion by saying that, in those jurisdictions where the rule obtains that the person killed or injured is presumed to have been in the exercise of due care, and where the burden of showing the contrary is on the defendant, the question whether the circumstances attending the death of a traveler killed at a railway crossing are such as to warrant the presumption that the traveler, prompted by the instinct of self-preservation, exercised the care which the law demands of travelers in such cases—there being no witness to the accident, and no evidence speaking upon the question of the manner in which the deceased approached and went upon the track—will be a question of fact for the jury." The whole difficulty seems to result from the different rules employed to determine the question of the burden of producing evidence upon the issue of the plaintiff's care. Where the law is that that burden is upon the plaintiff, as in this state, it is overlooked or disregarded by holding that he is not obliged to submit evidence, either direct or indirect, of his conduct, but may satisfy the rule by invoking a presumption of right-acting. Cases, therefore, decided upon a different theory of the burden of proof, which seem to enforce that presumption (*Cleveland, etc., R. R. v. Rowan*, 66 Pa. 393; *Weiss v. Railroad*, 79 Pa. 387; *Northern, etc., Ry. v. State*, 29 Md. 420, 96 Am. Dec. 545; *Southern Ry. v. Bryant*, 95 Va. 212, 28 S. E. 183; *Petty v. Railway*, 88 Mo. 306; *Atchison, etc., R. R. v. Hill*, 57 Kan. 139, 45 Pac. 581), cannot be useful authorities in this jurisdiction. See, also, *Continental, etc., Co. v. Stead*, 95 U. S. 161, 164, 24 L. Ed. 403; *Texas, etc., Ry. v. Gentry*, 163 U. S. 353, 356, 16 Sup. Ct. 1104, 41 L. Ed. 186; *Baltimore, etc., R. R. v. Landrigan*, 191 U. S. 461, 473, 24 Sup. Ct. 137, 48 L. Ed. 262.

Legislation may establish a rule of procedure and require a defendant to prove, in the first instance, the contributing negligence of the plaintiff. See *Foss v. Baker*, 62 N. H. 247, 250; *Walsh v. Railroad*, 171 Mass. 52, 50 N. E. 453. It may perhaps even go so far as to make the injury received evidence for the plaintiff of the defendant's negligence, throwing the burden upon the latter of proving his freedom from fault. But, whatever the rule may be as to the burden of proof, or as to the duty of producing evidence in the first instance to prove or disprove a fact in issue, it cannot itself be evidence to be weighed with other evidence in ascertaining the ultimate fact. The burden of going forward with proof is not a species of evidence for the consideration of the jury. It is merely a rule of law, based in part on expediency and convenience in the trial of cases, and in part, in some instances, on a presumption of law derived from a conception of the conduct of men in general. But, as said by Doe, J., in *Lisbon v. Lyman*, 49 N. H. 553, 563: "A legal pre-

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sumption is not evidence. In civil cases it is the finding of a fact or the decision of a point, when there is no testimony, and no inference of fact from the absence of testimony, on the subject, or when the evidence is balanced. And often the fact is also found, or the decision made, by the rule of law which imposes the burden of proof on the party having the affirmative." In his *Treatise on Evidence*, Prof. Thayer says (page 314): "Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on the general experience, or probability of any kind, or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence." And on page 337 this language occurs: "While it is obvious, then, that a presumption—i. e., the assumption, intendment, taking for granted—which we call by that name, accomplishes, for the moment at any rate, the work of reasoning and evidence, it should be remarked, as I have said before, that neither this result, nor the rule which requires it, constitutes, in itself, either evidence or reasoning. This might seem too plain to require mention if it were not for the loose phraseology in which courts sometimes charge the jury, leaving to it in a lump 'all the evidence and the presumptions,' as if they were capable of being weighed together as one mass of probative matter." If there is a legal presumption that the ordinary man performs his duty and is not negligent, it is no more competent as evidence to prove the fact in a particular case, in the absence of other proof, than are other rules of law, including the presumption of innocence in criminal cases.

The views thus far expressed seem to be abundantly supported by the cases that are in point. In *O'Reilly v. Railroad*, 82 App. Div. 492, 81 N. Y. Supp. 572, a case very similar to the present, the court say (page 495 of 82 App. Div., page 574 of 81 N. Y. Supp.): "In fine, the record does not show that the deceased took any precautions whatever, and it does tend to show that, if he had done so, he would have seen the approaching car and escaped it, for the witness Shanley saw it rapidly approaching, lighted by electricity, and with the usual rumble of such a vehicle. I think that the plaintiff did not meet the obligation to show the absence of contributory negligence of her intestate. \* \* \* Even where the evidence upon such question points neither way, the plaintiff fails." In *Wiwirowski v. Railway*, 124 N. Y. 420, 26 N. E. 1023, it was held that, while want of contributory negligence on the part of a person killed at a railroad crossing may be established by inferences from the circumstances, such an inference may not be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. In *Cordell v. Railroad*, 75 N. Y. 330, 332, it is said: "When a person has been killed at a railroad crossing, and there are no witnesses of the accident, the circumstances must be such as to show that the deceased exer-

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cised proper care for his own safety. When the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be nonsuited. The presumption that every person will take care of himself from regard to his own life and safety cannot take the place of proof, because human experience shows that persons exposed to danger will frequently forego the ordinary precautions of safety." *Reynolds v. Railroad*, 58 N. Y. 248, is to the same effect. In *Walsh v. Railroad*, 171 Mass. 52, 56, 50 N. E. 453, 454, the court say: "There is nothing to show that the plaintiff's intestate, as he approached the crossing, looked or listened, or took any precautions to ascertain whether a train was coming. It is true that he may have been misled somewhat by the absence of the statutory signals, if these were not given, and by the open gates and the want of a light, and that, if he had looked, his view of the approaching train might have been obscured by trees, fences, and buildings. But whether he was misled, or whether he looked or listened, or tried to look or listen, is all a matter of conjecture. \* \* \* And the circumstances do not appear to have been such as to excuse him from exercising the care which every traveler is bound to exercise as he approaches a railroad crossing." See, also, *Livermore v. Railroad*, 163 Mass. 132, 133, 39 N. E. 790; *Moore v. Railroad*, 159 Mass. 399, 403, 34 N. E. 367. In *McLane v. Perkins*, 92 Me. 39, 46, 42 Atl. 257 (43 L. R. A. 487), it is said: "But in all cases the plaintiff's freedom from contributory negligence in the particular case must affirmatively appear in evidence, or at least by some legitimate inference from the evidence. It is not to be presumed. If sought to be established by inference, it must be by inference from facts in evidence in the case. It cannot be inferred from \* \* \* the argument that men are likely to be careful in danger. It is as true that men are careless as that they are careful. It is as true that men negligently contribute to their own injury as that they do not." See, also, *Chase v. Railroad*, 77 Me. 62, 52 Am. Rep. 744; *Day v. Railroad*, 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335. When the question is what a man did under a given state of facts, it is not often proved by showing or assuming what men in general would have done. What the average man would probably have done may furnish a standard by which to determine the legal duty of the man whose conduct is in question. When it is known what, in fact, he did, the question whether he performed his duty arises, which often, especially in cases for negligence, depends upon the conduct which the average man might be expected to disclose under similar circumstances. But this rule or principle which determines the degree of care which the law requires cannot also be used as evidence to prove that the conduct in question was that of an ordinarily prudent man. It does not furnish both the measure and the thing measured. The physical actions of a man, which are subject to his volition and control, cannot ordinarily be determined by presumptions based upon our general knowledge of human nature. We may be able to say

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that a machine will act in a certain way when subject to known forces, and so far as man is a machine we can calculate with some degree of certainty how he will act under known conditions, but so far as his actions are governed by his will, intelligence, and judgment, we cannot know what his specific acts were in a special situation, unless it is true that all men would act alike in the same situation. If the question is whether A. used good judgment in a business transaction with B., there is no presumption that he did what men in general would do under the circumstances, because it was his privilege to do differently. The fact that the great majority of minors are not emancipated is not evidence where the fact of the emancipation of a particular minor is in issue. *Lisbon v. Lyman*, 49 N. H. 553. The fact that the great majority of men pay their debts is not evidence of payment in an action of assumpsit upon a contract. *Kendall v. Brownson*, 47 N. H. 186. The fact that the great majority of mankind regard a certain religious doctrine as absolutely irrational and false is no evidence that a particular person entertained that opinion. *Spead v. Tomlinson*, 73 N. H. 46, 63, 59 Atl. 376, 68 L. R. A. 432. If there is a presumption of the sanity of a party, in the absence of evidence to the contrary, because most men are sane (*State v. Pike*, 49 N. H. 399, 408, 444, 6 Am. Rep. 533), it relates to a mental state or condition independent of volition, and not controlled or produced by intelligent mental effort. Upon the same ground, it may be inferred that a person's senses of sight and hearing and feeling are ordinarily acute. But the proposition that a man acted in one of several different ways in a specific instance, because a jury may happen to think that an ordinarily prudent man would have so acted, is illogical, and substitutes pure conjecture for proof. As a matter of substantive law, he is bound to exercise ordinary care, but that legal duty does not become legal evidence that he was free from fault. A plaintiff who has the burden of presenting evidence of that fact does not prove it, in the absence of direct evidence, by a legal presumption. The burden of proof cannot be shifted in that way upon the defendant. Nor as a practical proposition is such a method of reasoning logical. To infer that the plaintiff's intestate exercised the care which the average man of ordinary prudence would probably have exercised, from the mere fact that he belonged to the human species, is to guess that he was, in respect to carefulness of conduct at a particular time, the equivalent of the average man of ordinary prudence, and from this to infer that his voluntary acts were careful and prudent. The minor premise in the syllogism is a pure conjecture; hence the conclusion is worthless.

Since, therefore, it was incumbent on the plaintiff to present some evidence for the consideration of the jury tending to show that the deceased was exercising due care at the time he received his fatal injury, and since the instinct of self-preservation, if deemed evidence for any purpose, does not explain how or why he got upon the track in front of the approaching engine,

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and since legal presumptions of right-acting have no probative, evidentiary force, the motion for a nonsuit should have been granted. Whether the fact that the deceased in this case was traveling on foot, while in the Huntress Case the deceased was riding in a team, constitutes an important distinction between the two cases, it is unnecessary to inquire. If it does not, the Huntress Case must be overruled. This result makes it unnecessary to decide whether there was sufficient evidence of the defendant's negligence.

Exception sustained. All concurred.

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**McQUISTEN v. DETROIT CITIZENS' ST. RY. CO.**

(Supreme Court of Michigan, Jan. 4, 1907.)

[110 N. W. Rep. 118.]

**Street Railroads—Operation—Injuries to Person on Track—Contributory Negligence.**—Whether plaintiff's decedent, who was struck by a car, was guilty of contributory negligence in going upon the track, held, on the facts, to be a question for the jury.

**Same.\***—Even though one could see an approaching car, if in the exercise of common prudence he may reasonably think there is time to cross safely, he is not chargeable with negligence in attempting to do so.

Error to Circuit Court, Wayne County; William L. Carpenter, Judge.

Action by William D. McQuisten, administrator of the estate of Peter Trudell, deceased, against the Detroit Citizens' Street Railway Company. From a judgment for defendant, plaintiff brings error. Reversed, and judgment directed.

Argued before McALVAY, MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ.

*William Look* (George Gartner, of counsel); for appellant.

*Brennan, Donnelly & Van DeMark*, for appellee.

MOORE, J. This action is brought to recover damages for the death of plaintiff's intestate, who was instantly killed by a car of defendant company March 2, 1895. After plaintiff's testimony was in, and also at the close of the testimony for defendant, a motion was made to take the case from the jury. These motions were overruled. The case was submitted to the jury

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\*For the authorities in this series on the question whether there can be a recovery for injuries sustained in an attempt to cross a railroad track in front of a train or street car which was seen by the party to be approaching before he made such attempt, see foot-notes appended to *Cranch v. Brooklyn Heights R. Co.* (N. Y.), 21 R. R. R. 610, 44 Am. & Eng. R. Cas., N. S., 610; *Kannenberg v. Conestoga Traction Co.* (Pa.), 21 R. R. R. 80, 44 Am. & Eng. R. Cas., N. S., 80.



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by the trial judge, and a verdict of \$3,500 was rendered in favor of the plaintiff. When the case was submitted to the jury, it was agreed that, if the trial judge should later conclude he ought to have directed a verdict for defendant, he should set aside the verdict, in case one was rendered in favor of plaintiff, and enter one in favor of defendant. Afterward a motion was made by defendant to set aside the verdict and enter one in favor of defendant. The trial judge was of the opinion that the testimony showed deceased was guilty, as a matter of law, of contributory negligence, and set aside the verdict, and entered one in favor of defendant. This was done April 22, 1902; the trial judge suggesting that, if he was wrong, the Supreme Court would correct his error, and doubtless reinstate the verdict and judgment, in accordance with the practice in *Rudell v. Ogdensburg's Transit Company*, 117 Mich. 568, 76 N. W. 380, 44 L. R. A. 415.

The accident occurred about half past 10 o'clock in the morning, on Jefferson avenue, near Bowen avenue. The track of defendant at that time was north of the traveled portion of the street. The street runs east and west. North of the railway track, at a distance therefrom variously stated by the witnesses to be from 3 to 7 feet, was a well from which teamsters were in the habit of drawing water for their teams. It is claimed that parallel to the track, on the north side thereof, looking west, and from 4 to 7 feet from the north rail, were the trolley and telephone poles and a row of trees that somewhat obstructed the view. The deceased and two other teamsters, each in charge of a team, stopped their teams opposite the well, and from 3 to 6 feet south from the railway track, for the purpose of watering their horses. It is claimed that before crossing the track deceased looked in each direction, and then went to the well and drew a pail of water; that after getting his pail filled he looked in a westerly direction and started across the track, and when about half way across he was struck by a car running at the rate of 30 or 40 miles an hour; and that no gong or bell was sounded, and that no warning was given of its approach. Testimony was given by several witnesses tending to support the plaintiff's claim. Counsel sought to discredit the witnesses for the plaintiff, claiming they testified differently at the coronor's inquest. They denied they had done so. The witnesses for defendant gave another version of the transaction, but that presented a question for the jury. It is claimed the body was carried by the car 160 feet after Mr. Trudell was struck, and that the car ran 100 feet further before it was stopped.

It is urged on the part of the plaintiff that if the signals had been given, or if the car had been running at a reasonable rate of speed, deceased would not have been hurt, and that it cannot be said, as a matter of law, the deceased was guilty of contributory negligence. It has been repeatedly held, even though one could see an approaching car, that if, in the exercise of common prudence, he may reasonably think there is time to cross



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safely, he is not chargeable with negligence. *Chauvin v. Detroit United Railway*, 135 Mich. 85, 97 N. W. 160, and the many cases there cited; *McVean v. Detroit United Railway*, 138 Mich. 263, 101 N. W. 527, and cases cited therein; *Gaffka v. Detroit United Railway (Mich.)* 106 N. W. 1121; *La Londe v. Traction Co. (Mich.)* 108 N. W. 365. We think it cannot be said, as a matter of law, deceased was guilty of contributory negligence. The trial judge properly submitted that question to the jury in his charge, and the verdict rendered should have been permitted to stand.

The last judgment is reversed, and the first one reinstated, with costs of both courts.

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NORFOLK & W. RY. CO. v. DENNY'S ADM'R. SAME v. EDWARDS' ADM'R.

(Supreme Court of Appeals of Virginia, Jan. 17, 1907.)

[56 S. E. Rep. 321.]

**Courts—Comity of States.**—An action to enforce a right given by statute of another state will be entertained; the statute not being contrary to the policy, or prejudicial to the interests, of the state in which the action is brought.

**Evidence—Presumptions—Laws of Other States—Statutes—Necessity of Pleading.**—The declaration, in an action for injury to persons on the track of a railroad in another state, need not allege that under the laws of that state it was the duty of the railroad company to do and perform the matters and things alleged to have been its duty in the premises; it being presumed that the laws of the two states on the subject are the same.

**Trial—Instructions—Facts and Evidence.**—While employees of contractors for construction of a railroad were walking to their work on the track, they were killed by a train. In an action therefor against the railway company, the court instructed that if it was contemplated in the construction contract that the workmen should use the tracks in going to and from their work, or that such use was practically necessary, such use of the track did not constitute the employees trespassers or mere licensees, but they were there by invitation of the company. Held, that in the absence of evidence of the terms of the contract, or that such use of the track as a passway was necessary to the accomplishment of such work, or of evidence of anything more than that the track was a more convenient way of reaching the work, the giving of such instruction, the effect of which was to increase the duty of the company to the persons injured, if it was found that they were on the track by its invitation, was error.

**Railroads—Injury to Person on Track—Contributory Negligence.**—On the question of the contributory negligence of one injured by a train while walking on a railroad track, it is material whether he was

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there as a trespasser or mere licensee, or by invitation of the company.

**Same—Licensees—Duty of Company.\***—As to licensees on a railroad track, where there is reason to expect their presence, it is the duty of persons in charge of a train to avoid injuring them after they see or know of their danger, or could have known of it by the exercise of reasonable care; but the company is not obliged to provide additional force to keep a proper lookout.

**Same—Duty of Person on Track.†**—A licensee on a railroad track must vigilantly look and listen for the approach of trains from the rear, as well as from in front.

### Error to Corporation Court of Roanoke.

Two actions, one by James G. Denny's administrator and the other by Nathaniel N. Edwards' administrator, against the Norfolk & Western Railway Company. Judgment for plaintiffs. Defendant brings error. Reversed, and new trial awarded.

The declaration in the action brought by Denny's administrator is as follows:

"John R. Denny, administrator of James G. Denny, deceased, duly appointed and qualified as such under the laws of the state of Virginia, plaintiff, complains of Norfolk & Western Railway Company, a corporation, defendant, of a plea of trespass on the case, for this, to wit: That heretofore, to wit, on the 22d day of November, 1902, the defendant owned and operated a certain railway extending, in part, from Oakvale, in the state of West Virginia, to Wills, in said state, over and upon the track of which the defendant ran locomotive engines and trains of cars; that on, to wit, the date aforesaid, and for a long time, to wit, one year, prior thereto, on a portion of its said railway, to wit, that portion extending from said Oakvale to a point a considerable distance, to wit, three miles, east of said Oakvale, the said defendant caused to be conducted the repair of said railway and the construction of an additional track and other improvements to its said railway, and in the conduct of said operations, on said date and during said period of time on said portion of said track, a large number of men, to wit, 200, were constantly employed by the contractors engaged in said work; and the said employees, while engaged in the discharge of their duties, and in going to and from their place of work and place of encampment, without objection from and with knowledge and acquiescence of, the defendant, constantly used the aforesaid portion of defendant's railway as a walkway, and by reason of the premises

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\*See foot-notes appended to *Wagner v. Boston Ele. Ry. Co.* (Mass.), 19 R. R. R. 187, 42 Am. & Eng. R. Cas., N. S., 187; extensive note, 21 R. R. R. 218, 44 Am. & Eng. R. Cas., N. S., 218.

†For the authorities in this series on the subject of the care required of licensees for their own protection, see foot-notes appended to *Colorado & S. Ry. Co. v. Sonne* (Colo.), 18 R. R. R. 727, 41 Am. & Eng. R. Cas., N. S., 727.

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it became and was the duty of the defendant, and its agents and servants in charge and control of its locomotive engines and trains of cars, while operating and running such locomotive engine and trains of cars over the aforesaid portion of said defendant's railway, to keep a reasonable lookout for such of the aforesaid persons as might be walking on said railway, and to use reasonable care and prudence, in the operation and running of said locomotive engines and trains of cars, to avoid injuring them, and especially was it the duty of the said defendant, its said agents and servants, while operating and running its said trains backwards over said portion of said track to keep some person on the rear end of such train, whose duty it was especially to keep a lookout for persons who might be walking on said track, and to warn them in some reasonable and adequate manner of the approach of such backing train.

"And the plaintiff avers that the defendant, its agents and servants aforesaid, carelessly and negligently failed to discharge its aforesaid duties, and that on, to wit, the said 22d day of November, 1902, while the said James G. Denny, who was one of the men engaged in the operations of construction and repair as aforesaid, was walking on said portion of said railway, going from the place of his encampment to the place of his work, the defendant, and its agents and servants in charge and control, carelessly and negligently ran a locomotive engine and trains of cars backward over said portion of said track, and carelessly and negligently failed to have any person on the rear end of said train to warn persons of its approach, as it was its duty to do as aforesaid, and carelessly and negligently failed to keep any reasonable lookout or to warn the said James G. Denny, in any reasonable or adequate manner of the approach of said train, and by reason of the carelessness and negligence of the said defendant, and its agent and servants aforesaid, the said train of cars and locomotive engine was run against, upon, and over the said James G. Denny, and he was thereby instantly killed.

"And the plaintiff avers that there was at the time of the death of the said decedent, James G. Denny, and still is, a statute of West Virginia, relative to the liability of persons and corporations for damages in case of injury by negligence causing death, substantially the same as the statute of Virginia upon the subject, which said statute of West Virginia is in the words and figures following, to wit:

"“(5) Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damage in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

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“(6) Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased; provided, that every such action shall commence within two years after the death of such deceased person.’

“2. And for this, also, to wit: That heretofore, to wit, on the 22d day of November, 1902, the said defendant owned and operated a certain railway extending, in part, from Oakvale, in the state of West Virginia, to Wills, in said state, over and upon the track of which the said defendant ran locomotive engines and train of cars; that a large portion of the said railway, to wit, that portion lying between Oakvale and a point a considerable distance, to wit, three miles, east thereof, was, on the date aforesaid and had been for a long time, to wit, one year, prior thereto, used by the public as a walkway without objections from, and with the knowledge and acquiescence of, the said defendant; and by reason of the premises it became and was the duty of the said defendant, and its agents and servants in charge and control of its locomotive engines and trains of cars, while operating and running such locomotive engines and trains of cars over the aforesaid portion of said defendant's railway, to keep a reasonable lookout for pedestrians walking along said portion of its railway, and to use reasonable care and prudence to avoid injuring them.

“And the said plaintiff avers, that on, to wit, the date aforesaid, while the said James G. Denny was walking on and along said portion of said railway, at a point a considerable distance, to wit, one mile, east of said Oakvale, the said defendant, and its agents and servants in charge of, operating, and running the said defendant's locomotive engine and trains of cars eastwardly over said portion of said railway, carelessly and negligently failed to perform their duty as aforesaid, and carelessly and negligently ran the said engine and train of cars, against, upon, and over the said James G. Denny, and thereby instantly killed him.

“And the plaintiff avers that there was at the time of the death of the said decedent, James G. Denny, and still is, a statute of West Virginia, relative to the liability of persons and corporations for damages in case of injury by negligence causing death, substantially the same as the statute of Virginia, upon the subject, which said statute of West Virginia is in the words and figures following, to wit:

“(5) Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damage in respect

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thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

“(6) Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased; provided, that every such action shall commence within two years after the death of such deceased person.’

“3. And for this, also, to wit: That heretofore, to wit, on the 22d day of November, 1902, the said defendant owned and operated a certain railway extending, in part, from Oakvale, in the state of West Virginia, to Wills, in said state, over and upon the track of which the said defendant ran locomotive engines and trains of cars; that a large portion of the said railway, to wit, that portion lying between Oakvale and a point a considerable distance, to wit, three miles, east thereof, was on the date aforesaid, and had been for a long time, to wit, one year, prior thereto, used by the public as a walkway without objections from, and with the knowledge and acquiescence of, the said defendant.

“And the said plaintiff avers that on, to wit, the date aforesaid, while the said James G. Denny was walking on and along said portion of said railway, at a point a considerable distance, to wit, one mile, east of said Oakvale, the said defendant, and its agents and servants in charge of, operating, and running the said defendant's locomotive engine and trains of cars eastwardly over said portion of said railway, carelessly and negligently ran the said engine and train of cars against, upon, and over the said James G. Denny and thereby instantly killed him.

“And the said plaintiff avers that by reason of the premises as set forth in the foregoing three counts of this declaration, and in each of them, an action hath accrued to the said plaintiff to have and recover damages of the said defendant, in pursuance of the statute for such cases made and provided, and that he has sustained, is entitled to recover, and demands damages in the sum of ten thousand dollars (\$10,000). And therefore he brings his suit.

“And the plaintiff avers that there was at the time of the death of the said decedent, James G. Denny, and still is, a statute of West Virginia, relative to the liability of persons and corporations for damages in case of injury by negligence causing death, substantially the same as the statute of Virginia upon the

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subject, which said statute of West Virginia is in the words and figures following, to wit:

“(5) Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

“(6) Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased; provided, that every such action shall be commenced within two years after the death of such deceased person.’”

Instructions were given as follows:

“(1) The court instructs the jury that if they believe from the evidence the defendant company contracted with contractors to do certain double-tracking for it between Oakvale and Wills, and further believe from the evidence that it was contemplated in said contract that the men engaged in said work should use the track of said company in going to and from said work, or that such use of said track was practically necessary in order to accomplish said work, such use of said track by the employees of said contractors did not constitute said employees either trespassers or mere licensees, but they were there by invitation of the company. If, on the contrary, the jury believe from the evidence that such use was neither contemplated nor practically necessary as aforesaid, then the mere use of said track by said employees, even with the company's knowledge, whether for the sake of convenience or otherwise, constitutes them mere licensees, and as such the defendant owed them the same duty as to trespassers.

“(2) The court intructs the jury that if they believe from the evidence that the defendant, or its agents and servants in charge of and operating its work train, had knowledge that the defendant's track had been for a considerable time and still was in constant and daily use by a large number of the employees of the contractors who were engaged in work upon defendant's track, or its agents and servants in charge of its train might reasonably have expected said employees to be upon the track at the time and point that the plaintiff's decedent was killed, it was the duty of the defendant, and its agents and servants in



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charge of and operating its train, to use reasonable care to discover and not to injure them; and if by the exercise of reasonable care the defendant, and its agents and servants operating said train, could have discovered said decedent and avoided injury to him, it was their duty to do so, and a failure to discharge that duty would be negligence, for which the defendant would be liable of the character charged in the declaration and provided such negligence was the proximate cause of the injury, and provided, further, the plaintiff's intestate was not guilty of any contributory negligence other than merely walking in the defendant's track.

"(3) The court instructs the jury that if they shall believe from the evidence that the plaintiff's decedent, along with other employees of the contractors, was in the habit of walking on defendant's track in going to and from their place of work with the knowledge and acquiescence of the defendant, and if they further believe from the evidence that at the time he was killed he was going to his work on defendant's track, then his mere presence there upon the track did not constitute him a trespasser, nor of itself constitute contributory negligence; and if you believe from the evidence that the defendant, or its agents and servants in charge of its train, should have apprehended the presence of such employees upon the track by reason of the large number of persons using same, it was their duty to have kept a reasonable lookout for them, to avoid injuring them, and to have given reasonable notice or warning to such employees of the approach of said train, and a failure to perform either duty would be negligence.

"The jury must further believe, however, that such negligence was the proximate cause of the injury, and that the plaintiff was not guilty of contributory negligence, before they can find against the plaintiff.

"(4) The court instructs the jury that if from the evidence in this case they believe that, by and with the knowledge of the defendant, its track at the point and time of the accident was constantly used by the employees of the contractors, and that defendant might reasonably have expected that such employees might be on its track, then said defendant owed the duty of taking reasonable care to discover and not to injure any such person whom it might reasonably expect to be on its track at that point; and if the jury believe from the evidence in this case that the servants of the defendant in charge of its trains could, in the exercise of reasonable care under the circumstances surrounding them at the time, by having a proper lookout, have discovered the danger of the plaintiff's intestate in time to avoid the accident, and that said defendant negligently failed to have a proper lookout, and this failure was the proximate cause of the death of plaintiff's intestate, and that there was no contributory negligence on the part of the plaintiff, then they must find for the plaintiff.

"(5) The court instructs the jury that if they believe from the

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evidence that the plaintiff's decedent was, at the time of his death, on defendant's track in conformity with the habit of himself and other employees of the contractors in going to and from their work on defendant's road, which habit was known to and acquiesced in by the defendant, it was his duty, while on said track, to use reasonable care to avoid being injured by the defendant's train; and reasonable care is such care and caution as a man of ordinary prudence would exercise for his own protection under the same circumstances, in view of the danger to be avoided, and includes the duty of looking and listening for approaching trains.

"(6) The court further instructs the jury that, even if they should believe from the evidence in this case that the plaintiff's intestate was himself guilty of contributory negligence in going upon defendant's track, yet if they believe from the evidence that the defendant knew that its track at this time and point was being constantly used as a passway by the employees of the contractor's in going to and from their work, and could or should by the exercise of reasonable care have discovered the perilous position of the plaintiff's intestate on its track, by having a proper lookout, or could have warned them of the approach of the train in time to avoid the accident, but negligently failed to do so, and by reason of such failure the plaintiff's intestate was run over by its train and killed, then they must find for the plaintiff, unless the jury further believe the plaintiff was guilty of contributory negligence other than merely going upon the track, in which case the jury must find for the defendant.

"(7) The court instructs the jury that contributory negligence is a matter of defense, and that the burden rests upon the defendant to prove it, unless it appears from the plaintiff's evidence; and, in determining whether or not the plaintiff's intestate was guilty of such contributory negligence, they should consider all the evidence which has been adduced, both plaintiff's and defendant's, and all the facts and circumstances of the case.

"(8) The court instructs the jury that, if they shall find for the plaintiff, then in fixing the damages they should take into consideration all of the facts and circumstances of the case as shown by the evidence, and fix the damages at such sum as they deem just and proper in the light of the whole evidence, not to exceed the sum of \$10,000 in either case.

"(9) The court instructs the jury that the table of expectancy of life given in evidence by the plaintiff, by which it appeared that the expectancy of life of Nathaniel N. Edwards was 23.1 years and that of James G. Denny was 18.8 years, is not conclusive or binding upon the jury, but is only evidence to be considered by them, along with all the other evidence in the case, in arriving at the amount of damages, if any.

"(10) The court instructs the jury that if they believe from the evidence that the plaintiffs' intestates were employed by the contractors who were worked upon the right of way of the defendant company and near its line of tracks at some point east

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of the camp at which the said parties boarded, and that in going to and from their work they had the choice of going by several different routes, and were not compelled to go along the east-bound track, upon which the train by which they were killed was going, and that they went upon said eastbound track simply as a matter of convenience, and not by invitation, as defined in instruction No. 1, then they cannot claim that the company owed them any higher duty than it would owe to a trespasser upon its track; and the court further instructs the jury that the only duty which the defendant company owed a trespasser upon its tracks is to use such care as a prudent man would use under the circumstances to avoid injury to said trespasser, after the employees of said company had such notice of their danger as would put a prudent man on his guard, and it is not necessary that the defendant should actually know of such trespasser's danger.

"(11) The court instructs the jury that a person going upon the tracks of a railroad company and walking along the same is bound to listen and keep a lookout in each direction for approaching trains, so that, if the jury believe from the evidence that the plaintiffs' intestates in these cases entered upon the tracks of the defendant company at the point mentioned in the declaration, and were walking along the same at the time of the accident, and that they did not listen or keep a lookout for trains approaching them from each direction, and that on account of their failure so to listen and to keep a lookout they did not get off the track in time to avoid the work train mentioned in the evidence as it approached them, and that this was the proximate cause of the accident to and death of the plaintiffs' intestates, then they must find for the defendant.

"(12) The court further instructs the jury that if they believe from the evidence that the plaintiffs' intestate, Denny and Edwards, on the morning of the accident which resulted in their death, were walking along the eastbound track of the company, and if they further believe from the evidence that prior to that time they and other employees of the contractors by whom they were employed were in the habit of walking along said track with the knowledge and without objection on the part of the defendant railway company, yet, if they simply used this track as a matter of convenience, and that they were not there by invitation as defined in instruction No. 1, then they must be considered mere licensees, and in such case, when they entered upon said track and walked along the same, they took upon themselves all the ordinary risk attached to the place and the business carried on there. And the defendant company had the right, so far as said parties were concerned, to run its trains backwards and forwards and at such rate of speed as was customary under the circumstances, and, unless the plaintiffs show by a preponderance of evidence that the defendant or its agents either intentionally or willfully injured the said parties as they were walking along said track, or that, after they saw or knew of their danger, or by the exercise of ordinary care could have known of their danger, they could

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have avoided injuring them, then they must find for the defendant company.

"(13) The court instructs the jury that the burden of proving negligence is upon the plaintiff in both of the causes which are being tried before them, and that negligence must be proved by affirmative evidence, which must show more than a probability of a negligent act. A verdict cannot be found upon mere conjecture, and there must be affirmative and preponderating proof that the injury from which Denny and Edwards died would not have occurred except through the negligence of the defendant company or that of its agents in the manner charged in the declaration. Affirmative evidence, however, may be direct evidence of any fact or any reasonable inference therefrom.

"(14) The burden of proving that the defendant company was negligent is upon the plaintiffs, and they must prove this by a preponderance of evidence; and the mere fact of the plaintiffs' intestates having been found dead upon the tracks of the defendant company is not sufficient by itself to establish actionable negligence on the part of the defendant company, nor to raise a presumption of such negligence.

"(15) The court instructs the jury that if they believe from the evidence that the brakeman or conductor, who were on the end of the car of the work train, saw Denny and Edwards walking on the railroad track in front of the moving train, and there was nothing about their appearance or manner to indicate that they were not aware of their danger, then they had the right to presume that the said Denny and Edwards would exercise reasonable care and prudence to avoid danger, and would get off of the said track in time to avoid the approaching train, and it was not their duty to undertake to protect said Denny and Edwards until they saw that the said Denny and Edwards would not get off the said track and were in a position of danger."

*Robertson & Wingfield*, for plaintiff in error.

*Lee & Howard* and *Jas. P. Harrison*, for defendants in error.

KEITH, P. The intestates of plaintiffs were engaged in construction work upon the line of the Norfolk & Western Railway in West Virginia, and these actions are brought to recover damages for negligence on the part of the railway company, causing their death.

The declaration contains three counts, in each of which the West Virginia statute is set out at large:

"Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under

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such circumstances as amount in law to murder in the first or second degree, or manslaughter.

"Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased; provided that every such action shall commence within two years after the death of such deceased person."

There was a demurrer to this declaration and to each count thereof, which was overruled by the trial court. We shall not notice specifically any of the grounds of demurrer except the fifth, which states that "the declaration does not, nor does any count thereof, allege that under the law of West Virginia it was the duty of the defendant company to do and perform the matters and things alleged to be the company's duty in the premises."

In *Nelson's Adm'r v. C. & O. R. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583, this court said: "There is no doubt that, in a general sense, a statute can have no operation beyond the state in which it is enacted. But where a right to sue is given by statute in one state, we can see no good reason why an action to enforce that right should not be entertained in the courts of another state, on the ground of comity, just as if it were a common-law right, provided, of course, it be not inconsistent with the laws or policy of the latter state. If this were not so, a cause of action of any sort arising in a state whose laws are codified could not be asserted in another state because the right to sue is statutory. The true test, therefore, in all such cases, would seem to be this: Is the foreign statute contrary to the known policy, or prejudicial to the interests, of the state in which the suit is brought? And, if it is not, then it makes no difference whether the right asserted be given by the common law or by statute." In *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439, quoted from in the case just cited, Mr. Justice Miller says: "It is difficult to understand how the nature of the remedy, or the jurisdiction of the court to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Whenever, either by the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." Judge Lewis cites a great number of cases in support of his opinion, to which we refer.

In *Minor on Conflict of Laws*, p. 25, it is said: "At one time it was thought that statutes giving the right to recover for the death of a person by wrongful act were penal, and not enforceable in other states; but this view has long since been rightly overruled, and it is now universally held that such statutes are



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remedial, conferring a special remedy, and therefore enforceable abroad."

And just here it may be as well to anticipate what we deem it necessary to say upon the subject of the laws of West Virginia.

"Foreign laws are matters of fact, and, like other facts, should be proved, unless established by legal presumptions. A court will not take judicial notice of their existence or of their terms. And for this purpose the states of this Union are foreign to one another. \* \* \*

"Primarily, the mode of providing a foreign law depends upon its nature, as statutory or common law, written or unwritten. If the law which is to be proved is statutory, the statute itself must usually be produced, or such copy thereof as may be approved as evidence under the law of the forum. The judicial decisions of the state whose law is to be proved are not usually to be received in evidence to prove what is its statute law (for they are not the best evidence); but they should be looked to, in order to determine the proper construction of such foreign statutes after they have been otherwise established. And this is true, though the same provisions in the statutes of the forum have been construed differently there.

"With respect to the common or unwritten law of a foreign state or country, the general rule is that it is to be proved by the best evidence the nature of the case will admit of. This rule was formerly construed to require as a usual thing that such unwritten law must be proved by the testimony of legal practitioners of the foreign state or other persons learned in its laws. It was thought inadmissible to introduce the reports of cases adjudged in a particular state as evidence of the common law of that state. But in recent years the opinions of the courts have undergone a change in this respect, and it is now pretty generally conceded that the published official reports of adjudged cases are competent evidence for this purpose. In such cases it is the province of the jury to determine whether or not such adjudications have been made in the foreign state, but it is the duty of the court to construe them and to deduce the rules of law they establish. And such decisions must be presented in evidence at the trial. They cannot be used for the first time in an appellate court."

Minor on Conflict of Laws, pp. 528, 529, 530.

And, summing up the discussion of this subject, on page 532, the author concludes "that the decided trend of American decisions is towards the presumption, in the absence of contrary evidence, that the foreign law under which either party claims is identical with the *lex fori*."

We are of opinion that the demurrer to the declaration was rightly overruled, and that, with respect to the laws of West Virginia, there is no proper proof in respect to them, except as to the statute which gives the remedy and which is averred in the declaration, and that, except as to that statute, the law of West Virginia applicable to this case is to be presumed to be identical with the law of this state upon the same subject.



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It was agreed by counsel that the two cases of Denny's administrator against the railroad and Edwards' administrator against the railroad should be tried before one jury, that the evidence should be considered as introduced in each case, that separate verdicts should be found by the jury in each case, and that, in case of appeal, one record should be made up and one petition presented, which should be considered as made in each case.

The evidence tends to prove that Denny and Edwards were, at the time of the accident, employees of certain contractors engaged in the construction of a railroad track extending from Oakvale, in the state of West Virginia, to Wills, in that state; that the camp occupied by the employees was 300 or 400 feet from the railroad track, and that there were 100 to 200 persons engaged upon the work; that the work of construction had progressed until the part of the track upon which they were engaged at the time of the accident was about half a mile east of the camp; that upon the day of the accident Denny and Edwards got upon the track and were walking in the direction of the place where they were to be employed during the day; that this part of the track was used by the employees with the knowledge of the railway company, and had been so used during the whole time the work of construction had been going on, continuously, and without objection from any quarter; that on the morning of the accident, after these men had gotten upon the track, a coal train, moving from the west towards the east in the direction in which they were walking, came along, but, as it had sounded its whistle at a station a short distance to the west, Denny and Edwards stepped from the track and it passed on, doing them no injury. They returned to the track as soon as this coal train had passed, and had walked but a short distance when they were struck by a construction train and killed. This construction train consisted of two or three dirt cars, a box car, and an engine. It also was moving from the west towards the east; the dirt cars being in front as the train moved, pushed by the engine which was in the rear. The morning is described as being dark and gloomy; the time, just before or about sunrise on the 22d of November; and persons walking along the track could be indistinctly seen at a distance of from 75 to 100 yards. There is evidence of a negative character to the effect that no bell was rung and no whistle sounded, and with respect to these facts it may be that the evidence was of such character as to create a conflict, in accordance with *Southern Ry. Co. v. Bryant's Adm'r*, 95 Va. 212, 28 S. E. 183, to be determined by the jury. With respect to the light, the evidence seems to be that, while there was none upon the dirt cars which were in front and nearest to the persons injured, a brakeman upon the box car did have a light. There was evidence, also, that there were paths alongside the railroad track, leading to the place at which the men were at work, and a road running from the camp in the same direction, but which necessitated a considerable detour and the crossing of lands as to which there is no proof that the employees had any

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license, except that they were permitted by the owners to drive the mules and carts over them for certain purposes. It appears, also, that these means of access to the work were less convenient than the railroad track; the road referred to being more circuitous, and the paths being rough and uneven, so that it had been the custom for many months for the employees of the contractors to use the railroad track in passing from the camp to the place at which they were employed—the point at which the daily work was to be performed moving gradually to the east as the work upon the track progressed from day to day.

Upon this state of facts, the plaintiffs and the defendant asked the court to instruct the jury; and the court, taking these prayers for instructions as the basis for its action, gave to the jury 15 instructions of its own.

The first instruction states that if the jury "believe from the evidence that the defendant company contracted with contractors to do certain double-tracking, and further believe from the evidence that it was contemplated in said contract that the men engaged in said work should use the tracks of the company in going to and from said work, or that the use of said track was practically necessary in order to accomplish said work, such use of said track by the employees of said contractors did not constitute said employees either trespassers or mere licensees, but they were there by invitation of the company." There is no proof of the terms of the contract between the defendant company and the contractors. There is proof, and abundant proof, that there was a contract between the contractors and the defendant company, and that Denny and Edwards were the employees of the contractors. The object of this instruction is to take the persons injured out of the category of mere licensees, and to place them upon the railroad track by the invitation of the company, thus changing the nature of the duty owed to them by the railroad company, when there is no evidence of any such fact. Nor is there any evidence that the use of the railroad track as a pass-way was necessary to the accomplishment of the work upon which the employees were engaged. There is evidence that the track was a more convenient way of reaching the work. One of the grounds of defense was that plaintiffs' intestates were guilty of contributory negligence in going on the track and in failing to keep a reasonable lookout for approaching trains; but, if it was necessary to go on the track in order to do the work which they were employed to do, that necessity would be the equivalent of an invitation. We do not mean to say that walking upon the track, under the circumstances, was in itself proof of contributory negligence; but it did impose upon them a higher degree of care in looking out for approaching trains, or for any other source of danger, than would have been the case had they been upon the track by the express invitation of the company, or as a necessary result from the fact of employment, in either of which cases the duty imposed upon the railroad company to look out for their safety would have been in a corresponding degree increased.

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The word "necessary" is somewhat elastic in its meaning. It may mean "such as must be;" "impossible to be otherwise;" "not to be avoided;" "inevitable." Webster's Dict. Or it may mean that one thing is convenient, or useful, or essential, to another. Bouv. Law Dict. It is plain from the context that in the instruction under consideration it was used in its primary sense, as given by Webster, *supra*. For in the next branch of the instruction it is said: "If, on the contrary, the jury believe from the evidence that such use was neither contemplated nor practically necessary as aforesaid, then the mere use of said track by said employees, even with the company's knowledge, whether for the sake of convenience or otherwise, constitutes them mere licensees, and as such the defendant owed them the same duty as to trespassers."

The second instruction is as to the duty owed by the railroad company to the persons injured, regarding them as mere licensees. The decisions of this court have established that mere licensees entering upon the premises of another take upon themselves the ordinary risks attendant upon the situation as it exists. By "mere licensees" we mean those who are clothed with no right, and to whom no invitation has been extended, but who are upon the premises of another by permission or acquiescence. Our decisions establish it to be the duty of a railroad company with respect to mere licensees, where there is reason to expect their presence in a position of danger upon the track, as where it is known to a railroad company that its track is habitually used as a passway, to use ordinary care for their safety and to do whatever may be within its power to avoid injury after their position of danger is known. While such licensees have no right to expect that railroad companies shall make, or equip, or run their trains, or construct or repair their tracks, with a view to their safety, yet it is the duty of the railroad company in the operation of its trains, under such conditions as exist, and with such equipment as has been provided, to exercise ordinary care to avoid injuring persons walking upon that track after it saw or knew of their danger, or could have known of it by the exercise of reasonable care. *N. & W. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846; *C. & O. Ry. Co. v. Rogers*, 100 Va. 333, 41 S. E. 732; *C. & O. Ry. Co. v. Farrow's Adm'r*, 106 Va. —, 55 S. E. 569.

In *N. & W. Ry. Co. v. Wood*, *supra*, the rule with respect to bare licensees is stated to be that "one who is permitted by the passive acquiescence of a railroad company to come upon its depot platform for his own purposes, in no way connected with the railroad company, is a bare licensee, who, though relieved from the responsibility of a trespasser, takes upon himself all the ordinary risks attached to the place and the business carried on there."

In *Hortenstein v. Virginia-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996, it is said: "A railroad company does not owe to trespassers or bare licensees the duty of providing reasonably safe appliances, and such a party cannot complain, though the appliances be ever so unsafe. Nor does it owe them the duty of giv-

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ing notice of a change of schedule of its trains, or their rate of speed, nor of sounding crossing signals." See, also, Walker's Adm'r v. Potomac & Fredericksburg R. Co. (Va.) 53 S. E. 113.

In N. & W. Ry. Co. v. Stegall's Adm'r (Va.) 54 S. E. 19, it was held that "a railroad company does not owe the duty of provision to a bare licensee on its tracks, nor does it owe him the duty of employing competent servants to manage its trains, or to run them in any particular manner, or at a particular rate of speed."

A licensee, while not regarded as a trespasser, must, when upon the track of a railroad, exercise that degree of diligence for his safety which his situation requires. He is there by permission, and is not a trespasser. The railroad company must exercise reasonable care to do him no injury, and he must use reasonable care for his own protection, and is required vigilantly to look and listen both in front and rear for approaching trains. Shearman & Redfield on Neg. § 480.

We do not think there is any error in the court's instructions Nos. 2 and 3. Nor is there any error in instruction No. 4, unless it be in the use of the words "by having a proper lookout." If the court meant to say that it was the duty of the employees of the railroad company upon the train, under the circumstances, to take reasonable care to discover and not to injure any person whom they might reasonably expect to be on the track at that point, the instruction would be free from objection, but would seem to be unnecessary, in view of instructions Nos. 2 and 3, which would then cover the same proposition. If, however, the court meant to say that it was the duty of the railway company to provide additional force in order to keep a proper lookout, then it would be erroneous; and at a future trial it would be well for the court to guard against what seems to be, at the least, ambiguity of expression.

We see no objection to the fifth, sixth, seventh, eighth, and ninth instructions given by the court. The tenth instruction must fall with instruction No. 1, to which it refers. We see no objection to instruction No. 11. No. 12 is amendable to the same objection taken to Nos. 1 and 10, and must fall with them. We find no objection to the law as stated in Nos. 13, 14, and 15, which are approved.

Without passing upon the facts, we are of opinion that, for errors in the instructions, the judgment should be reversed, and a new trial awarded.

**DUTEAU v. SEATTLE ELECTRIC CO.**

(Supreme Court of Washington, Feb. 13, 1907.)

[88 Pac. Rep. 755.]

**Street Railroads—Injuries to Persons on Track—Care Required.\*—** Where a motorman sees a man ahead of him near the track or approaching it, and there is nothing to indicate any inability on his part to care for himself, the motorman has a right to assume that the other will act as a prudent man would and it is not incumbent upon the motorman to stop the car until he sees that the other is in a position of apparent danger.

**Same—Instructions.**—In an action against a street railroad for injuries to one struck by a car, it was not error for the court to fail to embody the "last chance" doctrine in the instructions on contributory negligence.

**Appeal and Error—Review—Failure to Present Question below—Instructions.**—Ballinger's Ann. Codes & St. § 4993, provides that the court shall charge the jury on the law of the case. Held that, where a party failed to request any further or more specific instructions than those given by the court, he could not be heard to complain on appeal that the charge did not cover a certain phase of the case.

Appeal from Superior Court, King County; George E. Morris, Judge.

Action by Joseph Duteau against the Seattle Electric Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

*Arthur C. Dresbach* and *F. A. Gilman*, for appellant.

*Hughes, McMicken, Dovell & Ramsey*, for respondent.

RUDKIN, J. The plaintiff, soon after alighting from a street car operated by the defendant company in the city of Seattle, was struck by another car operated by the same company, going in the opposite direction on a parallel track, and received certain personal injuries which it is unnecessary to state in detail here. This action was brought to recover damages for the injuries thus received. Judgment was entered in favor of the defendant on the

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\*For the authorities in this series on the question whether those in charge of trains or street cars have the right to act on the assumption that persons seen on or near railroad tracks will avoid danger from trains or cars, see foot-notes appended to *Eckhard v. St. Louis Transit Co.* (Mo.), 21 R. R. R. 831, 44 Am. & Eng. R. Cas., N. S. 831; *Schmidt v. Missouri Pac. Ry. Co.* (Mo.), 21 R. R. R. 806, 44 Am. & Eng. R. Cas., N. S., 806; foot-notes appended to *Birmingham Ry., L. & P. Co. v. Clark* (Ala.), 21 R. R. R. 618, 44 Am. & Eng. R. Cas., N. S., 618; *Illinois Cent. R. Co. v. Ackerman* (C. C. A.), 21 R. R. R. 76, 44 Am. & Eng. R. Cas., N. S., 76; foot-notes appended to *Garvick v. United Rys. & Elec. Co.* (Md.), 20 R. R. R. 615, 43 Am. & Eng. R. Cas., N. S., 615.

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verdict of a jury, and from this judgment the plaintiff has appealed.

Error is assigned: (1) In the giving of two instructions to be presently noted; (2) in the failure of the court to instruct the jury on the law of the case; and (3) in the failure of the court to grant a new trial.

The two instructions to which exceptions were taken are as follows: "(7) When a motorman sees a man ahead of him alongside of the track, or approaching the track upon which his car is traveling, and this man is apparently able to take care of himself, there is nothing about the appearance of the man which indicates any inability to care for himself, the motorman has a right to assume that this man will act as an ordinary, careful, prudent man would act under such circumstances, and it is not necessary for him to stop his car until he sees that this man is in a position of apparent danger; then it is necessary for him to stop his car for the purpose of avoiding a collision." (10) "I will now come to this defense of contributory negligence and define that to you. Now, a man is guilty of contributory negligence in one of two ways. The first way is when he does something which an ordinary, prudent, careful man would not do under the same circumstances; the other way is when he fails to take such precautions for his safety as an ordinary prudent man would take under the same circumstances and conditions. Now, if he does the first thing, or neglects to do the second thing, as I have detailed them to you, in other words, if he does what an ordinary, prudent, careful man would not do, or if he fails to do what an ordinary careful, prudent man would do under the same circumstances and conditions, then that is what the law calls contributory negligence, and if such negligence on his part contributes to any injury which he receives, then he cannot recover, and it does not make any difference in that connection whether you should find that the defendant was guilty or not in any of these instances in which negligence has been charged in the complaint. If you should also find that the plaintiff himself was guilty of contributory negligence in any of these ways in which I have attempted to define them to you, and that such contributory negligence on his part to contribute to his own injury and was the proximate cause of his own injury, then he cannot recover." It seems to us that these instructions contain a correct statement of the law. If a motorman may not assume that persons on the street will exercise due care for their own safety, until something in their action or appearance warns him to the contrary, as stated in the seventh instruction, it is needless to say that the operation of street cars on crowded thoroughfares would be well nigh impossible. *Trayer v. Spokane Street Ry. Co.*, 25 Wash. 225, 65 Pac. 248; *Nellis Street Ry. Accidental Law*, p. 257; *Thompson, Com. on Neg.* § 1389.

The objection to the tenth instruction is that it does not embody what is commonly called the "last chance" doctrine. A court cannot embody in a single instruction the law applicable to every



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phase of a case, and the doctrine of the last clear chance is not so intimately connected with the doctrine of contributory negligence that the latter cannot be defined without including the former. The instruction was manifestly correct as far as it went, and if it did not go far enough, it was the duty of the appellant to request a more specific or an explanatory instruction. Furthermore, the doctrine for which the appellant contends was substantially embodied in instruction No. 7, *supra*. The assignment that the court failed to charge the jury on the law of the case is perhaps too general to merit consideration at the hands of this court. It seems to be the contention of the appellant that a party may submit his case to the court, without requests for instructions, and without exceptions to the charge as given, and then raise for the first time in the appellate court the question that the instructions do not cover every possible phase of the case. This contention entirely loses sight of the fact that this is a court for the correction of errors, and that the purpose of an appeal is to obtain a review of the rulings and decisions of the court below. The following statement of the rule found in volume 11 of the Ency., Pl. & Pr. p. 217, is fully supported by the decisions of this court: "The rule as to nondirection is altogether different from that just stated, for while it is the duty of the court to give instructions requested which are correctly drawn and applicable, and which are seasonably presented, it is a general rule in both civil and criminal cases, subject to a few exceptions which will be noticed hereafter, that mere nondirection, in the absence of request, does not constitute error. If an instruction is correct as far as it goes, but is too general, or is not sufficiently full and explicit, or omits material issues raised on the pleadings and proof, error cannot be assigned in the absence of a properly drawn request for more specific and comprehensive instructions. The reason of this is plain. The failure of a judge to charge upon any material point usually results from inadvertance, and the law casts upon the parties the duty of calling the judge's attention to the matter. If he then refuses to give a properly requested instruction, such refusal is ground of error, but a party cannot, in a court of error, avail himself of an omission which he made no effort to have supplied at the time. The court cannot be presumed to do more in ordinary cases than express its opinion upon the questions which the parties themselves have raised on the trial. It is not bound to submit to the jury any particular proposition of law unless its attention is called to it. If counsel desire to bring any view of the case before the jury, they must make such view the subject of a request to charge, and failing in this they cannot assign error." See *Box v. Kelso*, 5 Wash. 360, 31 Pac. 975; *McQuillan v. Seattle*, 13 Wash. 600, 43 Pac. 893; *Lownsdale v. Boom Co.*, 21 Wash. 542, 58 Pac. 663; *Howe v. West Seattle & Improvement Co.*, 21 Wash. 594, 59 Pac. 495. In *Linbeck v. State*, 1 Wash. 336, 25 Pac. 452, and *State v. Meyers*, 8 Wash. 177, 35 Pac. 850, the failure of the court to charge the jury that no inference of guilt should be drawn from the failure of a defendant to testify in a criminal case was

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held to be error, even though no request for such an instruction was made. The latter case was decided by a divided court, and these are believed to be the only instances in which this court has held that error can be predicated on the failure of the court to give any particular instruction to a jury, in the absence of a request therefor, and these cases were based on the provisions of a particular statute. Our statute (section 4993, Ballinger's Ann. Codes & St.) may be so far mandatory that a total failure to instruct a jury would be error even in the absence of a request for instructions or an exception, but upon that question we express no opinion. Yet the scope and general nature of the charge is left to the discretion of the trial court, and, in the absence of a request for further or more specific instructions, and an exception to the court's refusal, that discretion will not be reviewed on appeal.

We will add, in concluding this branch of the case, that the charge before us is not open to the objections urged against it. It contains a clear and concise statement of the issues in the case and of the general rules of law applicable thereto. The motion for a new trial is based on the insufficiency of the evidence to justify the verdict. Without reviewing the testimony here, the jury would be amply warranted in finding either a lack of negligence on the part of the respondent, or contributory negligence on the part of the appellant.

There is no error in the record and the judgment is affirmed.

HADLEY, C. J., and FULLERTON, ROOT, CROW, MOUNT, and DUNBAR, JJ., concur.

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**SOUTH COVINGTON & C. ST. RY. CO. v. CLEVELAND.**

(Court of Appeals of Kentucky, March 7, 1907.)

[100 S. W. Rep. 283.]

**Street Railroads—Personal Injuries—Persons Driving Near Track—Duty of Motorman.\***—Where a motorman could have seen from the actions of a horse driven by plaintiff that it was liable at any moment to become uncontrollable and place plaintiff in peril by backing the buggy upon the track, it was his duty to slacken the speed of his car, or to stop it, if necessary, to avoid a collision.

**Trial—Requested Instructions—Instruction Already Given.**—In an action for injuries to plaintiff by collision with a street car, it was not error to refuse to instruct that plaintiff could not recover if the

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\*For the authorities in this series on the subject of the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-notes appended to *Beier v. St. Louis Transit Co.* (Mo.), 22 R. R. R. 281, 45 Am. & Eng. R. Cas., N. S., 281; foot-notes appended to *Palmer Transfer Co. v. Paducah Ry. & L. Co.* (Ky.), 21 R. R. R. 815, 44 Am. & Eng. R. Cas., N. S., 815; foot-notes appended to *Birmingham Ry., etc., Co. v. Clarke* (Ala.), 21 R. R. R. 618, 44 Am. & Eng. R. Cas., N. S., 618.

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accident would not have occurred but for her negligence, where the court instructed that if she remained at the place of the accident, though her horse was restless on the passing of other cars, and his actions indicated that he might back the vehicle on the track in front of the approaching car, and the jury should find she was guilty of negligence in so doing, and that but for such negligence the accident would not have happened, she could not recover.

**Same—Misleading Instructions.**—In an action for personal injuries, an instruction that the plaintiff could recover for any mental or physical pain it was reasonably certain she “may” suffer was not erroneous as misleading, though the use of the word “will” would have been preferable.

**Damages—Exemplary Damages—Personal Injuries.**†—Exemplary damages are properly awarded where a motorman running his car at high speed fails to lessen it until too late to prevent collision with one driving near the track, and the motorman sees, or could see, the person in time to check his car or stop it, thereby avoiding the injury.

**Master and Servant—Tort of Servant—Scope of Employment—Liability of Master.**‡—Where it was within the scope of a street railway company’s inspector to see and converse with persons injured in street car accidents to learn the cause of the accident and the extent of the injury, the company was liable for indignity inflicted by him upon an injured woman by putting his hands upon her person, though the conduct was a step beyond his line of duty.

Appeal from Circuit Court, Kenton County.

“Not to be officially reported.”

Action by Edna Cleveland against the South Covington & Cincinnati Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*Ernst, Cassatt & McDougall*, for appellant.

*Robert C. Simmons*, for appellee.

CARROLL, C. In one paragraph of her petition against the appellant, the appellee averred that whilst she was in a runabout to which a horse was attached, the employees of appellant in charge of an electric car in Covington did with gross negligence operate and run the car against the vehicle in which she was sitting, causing it to be totally destroyed, and throwing her violently to the street, injuring her seriously and permanently. For

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†For the authorities in this series on the question, when exemplary or punitive damages are, and are not recoverable, see foot-notes appended to *Louisville & N. R. Co. v. Eaden* (Ky.), 22 R. R. R. 110, 45 Am. & Eng. R. Cas., N. S., 119; *Cole v. Blue Ridge Ry. Co.* (S. Car.), 21 R. R. R. 606, 44 Am. & Eng. R. Cas., N. S., 606; *Toledo, etc., R. Co. v. Gordon* (C. C. A.), 20 R. R. R. 544, 43 Am. & Eng. R. Cas., N. S., 544.

‡See foot-notes appended to *Roberts v. Southern Ry. Co.* (N. Car.), 22 R. R. R. 106, 45 Am. & Eng. R. Cas., N. S., 106.

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the injuries and damages thus inflicted, she asked judgment in the sum of \$10,425. In another paragraph she alleged that immediately after the accident she was carried into the house of a friend, and while there an inspector of the appellant company, in pursuance of orders to investigate the accident, obtained admittance to the room where she was lying, without invitation or request, and roughly and rudely seized and took hold of her person and examined the wound she had received. For this indignity she asked \$2,500. In its answer, appellant, after traversing the petition, pleaded contributory negligence on the part of the appellee. The jury returned a verdict in favor of appellant for \$4,500 for injuries received, \$500 for indignities, and \$100 for the vehicle. To reverse the judgment entered on this verdict, this appeal is prosecuted.

The facts are substantially as follows: Appellee, who was an experienced horsewoman, had driven in from the country and stopped on the street in front of the house of a friend, the vehicle and horse standing between the curbing and the street car track. The horse was restless and, during the time the buggy was standing in the street, would step forward and then backward, and manifest in other ways the fact that it was nervous and somewhat frightened. Several street cars passed during the time appellee was seated in the buggy talking to her friend. As the car that collided with the buggy approached, the horse became more unmanageable, and when the car was some 150 feet distant the horse, in the language of a witness, "began lunging forward and then back, and forward and back and reared a little." Finally when the car was in about 75 feet of the vehicle, the horse backed it on the track, when it came in contact with the rapidly approaching car. The motorman did not lessen the speed of the car until after the buggy had been backed over on the track, although there was nothing to prevent him from seeing for at least 175 feet that the horse was restless and liable at any moment to get on the track. The speed at which the car was running is variously estimated at from 8 to 20 miles an hour. It ran some 50 feet after striking the buggy. In respect to the conduct of the inspector, a preponderance of the evidence tended to show that appellee was lying on a couch in a nervous and excited condition, that her wounds had just been dressed by a physician when the inspector entered the front window of the room in which she was, sat down by her side, began questioning her about the accident, and opened her waist and examined and put his hands upon her person. The duties of an inspector, as testified to by himself, were to go at once to where an accident was reported, and see whether the conductor or motorman had performed their duties properly, clear the track, keep the cars going, and see the patient, and, if medical attention was needed, to send the company's doctor at once—and that it was not any part of his duty to make any physical examination of injured persons or to report the condition of persons who were injured. Appellant complains that the court erred to its prejudice

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in instructing the jury and in the admission of testimony relating to the indignity at the hands of the inspector. The court instructed the jury in substance that it was the duty of the motorman to keep a lookout for the presence of persons or vehicles, and to have his car under control, and to take all reasonable measures to avoid injuries to persons who might be upon the track, and that if the horse driven by appellee was restless and nervous, moving backward and forward, or prancing or rearing, and that such actions or movements, if any, would lead a person of ordinary prudence in the position of the motorman to believe there was danger of the vehicle being backed on the track ahead of the car, and that by the exercise of ordinary care the motorman could have observed the conduct of the horse in time to have stopped the car, or to have brought it under such control as to prevent the collision, and that he negligently failed to do this, they should find for the plaintiff.

In defining the damages that might be awarded, the jury were told that the measure would be a fair equivalent in money for the mental and physical pain that the plaintiff endured, if any, or that it was reasonably certain she may endure, if any, and a fair equivalent for the permanent impairment of her ability to earn wages by work or labor, as the natural result of her injuries resulting from the collision; and if the jury found from the testimony that the injuries were caused by the gross negligence of defendant's employees in charge of the car, then they might in their discretion, give a further sum as punitive damages, not exceeding in all the amount claimed in the petition.

Upon the question of the assault made by the inspector, the court told the jury that if they believed from the evidence that the inspector in entering the room where plaintiff was, acted in the scope of his employment, and without the request or consent of plaintiff, placed his hands upon her person and examined her wounds, they will find for her such sum as will fairly compensate her for the mental suffering, if any, and for her sense of shame or humiliation or wounded pride, if any, resulting from such action and indignity or insult to which she was thereby subjected. Other instructions were given, defining gross negligence and ordinary care; and, on the question of contributory neglect of appellee, the jury were instructed that if the plaintiff remained at the place where the accident happened, although her horse had previously been restless and plunging backward and forward at the time of the passage of the other street cars, and that the action of the horse indicated that he might back the vehicle in question on the track, or otherwise get on the track in front of the approaching car, and that plaintiff was guilty of negligence in this respect, and that but for such negligence the accident would not have happened, she was not entitled to recover; unless the motorman, by the exercise of ordinary care, could have stopped his car in time to prevent the accident after he saw, or ought to have seen, that the vehicle was about to get on the track in front of the car.



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It is insisted that the court should have instructed the jury that appellee was not entitled to recover damages resulting from the collision unless they should find that, at the time the motorman first saw, or, by the exercise of ordinary care, should have seen, that the buggy was about to be backed onto the track, he could have stopped his car in time to prevent the collision. Under this view of the case, although the motorman may have seen the horse rearing and prancing and lunging backwards and forwards, he was under no obligations to slacken the speed of his car, or anticipate that the vehicle might be backed on the track, or to take any action to prevent a collision until in his judgment the vehicle was about to be backed on the track. This does not express the measure of duty exacted from motormen in charge of electric cars. They cannot wait until the danger of collision is imminent or the person or vehicle is put in actual peril before exercising ordinary care to prevent an accident. It is true that the street car service is for the benefit of the public, and cannot fulfill its legitimate purpose unless it is operated with some degree of celerity. Nor is it necessary that a car must be slowed up every time a horse or team betrays signs of uneasiness. But, in weighing the duties of the motormen in cases of this character, it is necessary to consider the circumstances and conditions that present themselves calling for the exercise of reasonable care and good judgment upon his part. Here, a lady was seated in an open buggy standing by the side of the track in plain view of the approaching car. The motorman, if keeping a reasonable lookout, could have seen from the actions of the horse that he was liable at any moment to become uncontrollable and place the occupant of the buggy in peril of her life by backing the buggy in such a position that it would come in contact with the car, and the actions and movements of the horse were such as would lead a person of ordinary prudence to believe that there was danger of the vehicle being backed upon the track. It was therefore the duty of the motorman observing this condition of affairs to have slackened the speed of his car, or have stopped it entirely, if necessary, in order to prevent a collision that should have been anticipated. Thus, a motorman who sees a child walking on or near the street car track would be held to a higher degree of care than if an adult were in the same position, and might reasonably expect that there would be more danger of collision when a vehicle was being driven by a lady, and the horse was restless and excitable, than there would be if a teamster was driving a wagon by the side of the track. We, therefore conclude that the instruction of the court defining the duty of the motorman was correct. *Thiel v. South Cov. & Cin. Ry. Co.*, 78 S. W. 206, 25 Ky. Law. Rep. 1590; *South Cov. & Cin. Ry. Co. v. McHugh*, 77 S. W. 202, 25 Ky. Law Rep. 1112; *Thompson on Negligence*, § 1420; *Clarke, Street Railway Accident Law*, p. 336.

Upon the question of the contributory negligence of the appellee, appellant asked the court to say to the jury that appellee could not recover damages if she was at the time and place of the



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accident guilty of negligence, but for which it would not have happened. This general definition of contributory neglect is correct, but the court may with propriety point out in a general and fair way in an instruction defining contributory neglect the elements that constitute it as shown by the evidence. And this the court did in the case before us. We are unable to perceive in what respect the instruction given could be prejudicial to appellant, as by it the jury were told that if the plaintiff remained at the place where the accident happened, although her horse had previously been restless, plunging backwards and forwards, at the time of the passage of other street cars, and that the action of said horse at the time of the passage of other cars indicated that he might back the vehicle in question on the track, or otherwise go on the track in front of the approaching car, and find that she was guilty of negligence in so doing, and that but for such negligence the accident would not have happened, then the plaintiff is not entitled to recover. This instruction fairly submitted to the jury the contributory neglect upon which appellant relied to defeat her recovery, and pointed out in a general way the facts in which her negligence, if any, consisted.

The instruction defining the measure of damage is criticised in two particulars: It is said that the word "may" in the sentence "the measure of her damage will be a fair equivalent in money for the mental and physical pain that she has endured, if any, or that it is reasonably certain that she may endure, if any," should have been "will;" and that it was error to authorize the jury to award punitive damages. It is possible that the word "will" is preferable to the word "may" upon the idea that it defines with more accuracy the injury for which damages may be awarded; but it cannot be said that the word "may" in the connection in which it was used was misleading or prejudicial; in fact, to the mind of the ordinary juror there is no substantial difference between these two words. *Southern Ry. Co. v. Goddard*, 89 S. W. 675, 28 Ky. Law Rep. 523; *L. & N. R. R. Co. v. Logsdon*, 71 S. W. 905, 24 Ky. Law Rep. 1566. It is difficult to define with accuracy a state of facts amounting to gross negligence which alone authorizes the recovery of punitive damages. But under the evidence we are not prepared to say that the substantial rights of appellant were prejudiced by the instruction authorizing the jury to award punitive damages. The high speed of the car and the failure of the motorman to take any action to lessen it until it was too late to prevent the collision, although he saw, or should have seen, the peril in which appellee was placed in time to have checked his car or stopped it entirely, thereby avoiding the injury, manifested such a reckless disregard of the right of appellee, and the duty owing to her as to warrant the infliction of exemplary damages. The duty that street car companies owe to the public and the desire to gratify the imprudent taste for speedy transportation that has been created and encouraged by these and other carriers must not be allowed to cause them to forget and ignore the rights of persons occupying the streets. Drivers and pedestrians are not trespassers. They have an equal right with the street

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car companies to the use of the streets, and due care must be exercised by persons operating cars to prevent injury to them..

A vigorous attack is made on the action of the trial court in permitting evidence of the assault by its inspector to go to the jury, and in instructing that damages might be awarded therefor. The argument is pressed that if the inspector did lay hands on appellee, in so doing, he was acting entirely without the scope of his employment, and appellant cannot be held responsible for his conduct. It may be conceded that the master is not liable for the acts of his servant unless they are committed within the apparent scope of his employment, or, in the attempted discharge of his duties, he is directed or engaged to perform. The difficulty in close cases arises in determining when the servant ceases to act for his master, and assumes to act for himself, and upon his own responsibility. The courts of last resort, as well as text-book writers, have frequently endeavored to lay down some satisfactory rule that will be at once just to the master and to the public. The facts of each case are generally different. The duties and authority of servants and agents are so various that it is impracticable to set down any hard and fast rule that can be applied to every case. In the action before us it was entirely within the scope of the inspector's duty to see and converse with injured persons, to ascertain their wants, learn how the accident occurred, and inquire as to the extent of the injuries inflicted; and, in the performance of this duty the inspector did go into the room where the appellee was lying. He went, however, a step beyond the strict line of his duties in placing his hand upon the person of appellee. And, as this act upon his part is the sole offense committed by him, for which it is sought to hold the master liable, it is said that it cannot be held responsible for this indiscreet and rude conduct, because not done in the performance of his duties or the scope of his employment. It is evidence that in approaching appellee the inspector was acting in the interest of the company, and in laying his hand upon her person he was attempting to ascertain the extent of her injuries for its benefit. The law under circumstances like these will not undertake to make any nice distinctions fixing with precision the line that separates the act of the servant from the act of the individual. When there is doubt, it will be resolved against the master, upon the ground that he set in motion the servant who committed the wrong. *Thompson on Negligence*, §§ 554, 563; *New Ellerslie Fishing Club v. Stewart*, 93 S. W. 598, 29 Ky. Law Rep. 414; *Williams v. Southern Ry. Co.*, 73 S. W. 779, 24 Ky. Law Rep. 2214; *Smith v. L. & N. R. Co.*, 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72; *Patterson v. Maysville & Big Sandy Ry. Co.*, 78 S. W. 870, 25 Ky. Law Rep. 1750; *Louisville Water Co. v. Phillips' Adm'r*, 89 S. W. 700, 28 Ky. Law Rep. 557; *Sullivan v. L. & N. R. Co.*, 74 S. W. 171, 24 Ky. Law. Rep. 2344. We therefore conclude that appellant is liable for the acts of its inspector.

Upon consideration of the whole case, we do not find any prejudicial error. Wherefore the judgment of the lower court is affirmed.

CHESAPEAKE & O. RY. CO. *v.* NIPP'S ADM'X.

(Court of Appeals of Kentucky, March 13, 1907.)

[100 S. W. Rep. 246.]

**Trial—Questions for Jury—Weight of Evidence.**—Where witnesses say positively that a warning was given by sounding a whistle, and other witnesses who were in a position to know whether it was given or not say they did not hear it, the weight of the evidence is a question for the jury.

**Railroads—Injuries to Trespassers—Care Required.\***—The only duty that a railroad company owes to a trespasser on its track is to exercise ordinary care to avoid injury to him after his position of peril is actually discovered.

**Same.\***—The rule that where the public, with the knowledge and acquiescence of a railroad company, has continuously used the tracks for a long period of time, the presence of persons on the tracks at the point where it is so used must be anticipated by the company in running its trains, and it owes to such persons the duty of giving warning and keeping a lookout, is confined to cities or thickly populated communities, and is not extended to rural communities or sparsely settled regions.

**Same.†**—The fact that those in charge of a railway train failed to give the statutory, or any other, signal of its approach to a public crossing, gives no right of action to a trespasser on the track who is injured near the crossing.

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CARROLL, C. In October, 1901, George Nipp was struck and instantly killed by one of appellant's trains at a place known as the "Highland Stone Crusher," in Carter county. A trial in the circuit court resulted in a verdict and judgment in favor of the appellee for \$1,000, from which this appeal is prosecuted.

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Appellee rested their case upon the failure of the engineer to whistle for the road crossing, and upon this issue alone it was submitted to the jury; the court instructing the jury, in substance, that it was the duty of the servants of appellant in charge of the train to give warning of its approach to the public crossing east of the rock crusher by ringing the bell or sounding the whistle, and that, if the death of Nipp was caused by its negligence in this respect, they would find for appellee. They were further instructed that it was the duty of Nipp to exercise ordinary care for his own safety, and that if he knew, or by the exercise of ordinary care could have known, of the approach of the train in time to have prevented it from striking him, and negligently failed to avoid the injury, there could be no recovery. Other instructions were given, defining the measure of damage and the meaning of the word "care." Appellant asked the court to say to the jury that it was not liable in damages, unless the peril of Nipp was actually discovered in time to enable the engineer by the use of ordinary care to avoid striking him.

It is also earnestly insisted that sufficient evidence was not introduced by appellee to show a failure upon the part of the persons in charge of the train to give warning of its approach to the county road crossing, and that the court erred in instructing the jury upon this issue. The evidence touching this point is very conflicting. The weight of the affirmative evidence supports the theory that the usual and customary signals were given. On the other hand, a number of witnesses, who were in a position to hear the whistle if it had been sounded, testified that no whistle was sounded, or, if it was, that they did not hear it, although

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they could have heard the whistle if it had been sounded. In some jurisdictions it is held that affirmative evidence that a warning was given must be accepted as proof of that fact, although an equal or greater number of witnesses who were not listening especially for it testified that they did not hear the warning. *Horn v. B. & O. Ry. Co.*, 54 Fed. 304, 4 C. C. A. 346; *Culhain v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 137; *Shufelt v. F. & P. M. Ry. Co.*, 96 Mich. 327, 55 N. W. 1013; *B. & O. R. Co. v. Baldwin*, 144 Fed. 54, 75 C. C. A. 211. But this rule of evidence does not obtain in this state. Where witnesses say positively that a warning was given, and other witnesses who were in a position to know whether it was or not say they did not hear it, the question will be left to the jury. It is for them to consider the weight and sufficiency of the evidence, and the mere fact that affirmative evidence may be entitled to more weight than negative evidence will not warrant the court in refusing to submit to the jury the issue of fact raised by conflicting testimony of this character. It would be a radical innovation upon the prevailing practice in this state, and an unwarranted invasion of the right of trial by jury, to hold that the court, as a matter of law, should say that the evidence of persons who testified that, although nearby, they did not hear any whistle sounded, was not in conflict with the testimony of others who said positively that the proper signals were given; it being entirely competent to show, by persons who had an opportunity of knowing whether a whistle was sounded or not, that it was not sounded. The question of the effect and weight of their evidence is for the jury. The jury might be disposed to attach more importance to a statement like this made by a disinterested person than they would to an affirmative statement made by a party in interest. When evidence is competent to go to the jury, it is for them, and not the court, to say what weight shall be attached to it.

The main issues we are called on to consider may be stated thus: For the appellant it is contended that Nipp was a trespasser, and that it owed him no duty of lookout or warning until his presence was actually discovered on the track; that, although it may have failed to whistle for the crossing, Nipp, being a trespasser, could not complain of its negligence, if any, in this respect. For appellee, in the absence of a brief, it may be said to be his position that Nipp, at the time he was struck, was on or near the footpath that had been used with the knowledge and consent of the company for so long a period of time, and by so many persons, as to give the public the right to use it as a matter of right, and imposed upon the railroad company the duty of giving warning of the approach of trains to persons who might be on or crossing the track at this point, and that, in failing to give such warning, or to give the statutory warning of its approach to the public crossing near this footpath, it committed a breach of duty it owed to Nipp, and therefore must respond in damages to his estate for the destruction of his life; that it was its statutory duty to whistle or ring the bell for the county road

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crossing, and that persons using the footpath had the right to rely upon the performance of this duty, and, if it had discharged its duty in either of these respects, Nipp would have been warned of the approach of the train in time to have avoided being struck by it.

From a careful examination of the evidence, we have reached the conclusion that Nipp, at the time he was struck, was a trespasser upon the track, and therefore the only duty that appellant owed him was to exercise ordinary care to avoid injury to him after his position of peril was actually discovered. *Smith's Adm'r v. Illinois Central R. Co.*, 90 S. W. 254, 28 Ky. Law Rep. 723; *L., H. & St. L. R. Co. v. Jolly's Adm'r*, 90 S. W. 977, 28 Ky. Law Rep. 339. There is some evidence that the persons in charge of the engine could have seen Nipp at a point 300 or 400 feet distant from where he was struck; but in view of the fact that he was a trespasser, and the company did not owe him any lookout duty, or any duty until his presence was actually discovered, it is totally immaterial how far the engineer might have seen him if he had been keeping a sharp lookout. The only question is: When did he discover his presence on the track, and did he, after making this discovery, exercise ordinary care to avoid injury to him? The only evidence upon this point is that of the engineer, who testifies that he did not discover or see Nipp until it was too late to stop the train, or appreciably lessen its speed; that all he could do was to apply the emergency brake and sound the alarm whistle, and both of these things he immediately did. The fireman testifies that he did not see Nipp at all; that, as the train was approaching the rock crusher, he was looking back towards the rear end of the train in the performance of the duties imposed upon him by the rules of the company.

Considering the instructions given by the trial judge, he was evidently of the opinion that there was sufficient evidence of such long continued use of the footpath by the public as to impose upon appellant the duty of giving warning of the approach of its trains to this point, and that in crossing the track Nipp was a licensee, and not a trespasser. This question we will proceed to examine. The evidence discloses that there is no station at the point where the rock crusher was located, and that trains only stopped there under orders. Nor does it appear that there were any houses or buildings nearby, except a store, and that persons in the neighborhood trading at the store used this footpath in going from the public road to the store; it being also used by the laborers engaged in working at the crusher. How long this use of the footpath had been continued the evidence does not satisfactorily disclose, nor is it clear how many persons cross the track at this point each day. The witnesses estimated the number at from 10 to 50. The larger number of these used it when the stone crusher was in operation, being engaged as laborers, and in going to and from their work crossed the track at this point. It has been ruled by this court that where the public generally, with the knowledge and acquiescence of the railroad company, have continually used

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the tracks for a long period of time, the presence of persons on the track at the point where it is so used must be anticipated by the company in running its trains, and it owes to persons thus habitually using its right of way the duty of giving warning and keeping a lookout. *Davis v. L., H. & St. L. R. Co.*, 92 S. W. 339, 29 Ky. Law Rep. 53; *McCabe's Adm'r v. Maysville & Big Sandy R. Co.*, 89 S. W. 683, 28 Ky. Law Rep. 536; *L. & N. R. Co. v. Redmon's Adm'r*, 91 S. W. 722, 28 Ky. Law Rep. 1293. But the operation of this rule has been confined to cities and thickly populated communities, and has not been, and will not be, extended to rural communities or sparsely settled regions, although footpaths crossing the track and the right of way may be used by a large number of persons each day. In the county districts traversed by lines of railway, it is no uncommon thing for numbers of persons in going to public places, such as schoolhouses, churches, stores, and the like, to use paths or ways that cross the railroad tracks, but that are not private or farm crossings, and also to travel upon the right of way and tracks of the company. It may be also conceded that these persons use the right of way and tracks of the company with its acquiescence, in the sense that it does not interfere with their use, or takes steps to prevent it; but this use by individuals of the tracks and right of way of railroad companies in places of this character does not convert them from trespassers into licensees. Nor does it impose upon the company any duty of lookout or warning. Persons who thus use the tracks and right of way do so at their peril. They are trespassers upon dangerous premises, and assume the risk of any accident that may befall them by passing trains. *Gregory v. L. & N. R. Co.*, 79 S. W. 238, 25 Ky. Law Rep. 1986; *C. & O. Ry. Co. v. See's Adm'r*, 79 S. W. 252, 25 Ky. Law Rep. 1995; *Brown v. L. & N. R. Co.*, 97 Ky. 228, 30 S. W. 639; *C. & O. R. Co. v. Perkins*, 47 S. W. 259, 20 Ky. Law Rep. 608; *Wilmuth's Adm'r v. Illinois Central R. Co.*, 76 S. W. 193, 25 Ky. Law Rep. 671; *L. & N. R. Co. v. Redmon's Adm'r*, 91 S. W. 722, 28 Ky. Law Rep. 1293.

It is therefore not material whether the train that killed Nipp gave the statutory or any signals of its approach to the public crossing; nor does the speed at which the train was running enter into the case. Upon the facts presented by this record, the trial judge should have granted the request of appellant, and peremptorily instructed the jury to find for it.

Wherefore the judgment is reversed, with directions for a new trial in conformity with this opinion.

## LOUISVILLE &amp; N. R. Co. v. GOULDING.

(Supreme Court of Florida, Division A, Jan. 7, 1907.)

[49 So. Rep. 854.]

**Railroads—Injury to Person on Track—Trespasser.**—A quarantine guard, whose duty it is to prevent unauthorized persons from passing a “quarantine line” across railroad tracks, is not as matter of law a trespasser upon such tracks within a few feet of the line; it being reasonably made to appear the railroad company was probably aware of his presence there.

**Same—Negligence.**—A railroad company is not as matter of law free from negligence in backing a long freight train at night without a headlight, ringing of bells, or other efficient means to warn a quarantine guard on its track at his post of duty, whose presence there was acquiesced in and was reasonably to be anticipated.

**Same—Evidence.**—There being conflict in the evidence as to the rate of speed at which a train was running, and one witness testifying it was running at the “usual rate,” evidence as to the usual rate was not reversible error.

(Syllabus by the Court.)

Error to Circuit Court, Escambia County; Francis B. Carter, Judge.

Action by Anna Goulding against the Louisville Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

*Blount & Blount*, for plaintiff in error.

*Maxwell & Reeves*, for defendant in error.

COCKRELL, J. Frank R. Goulding, a quarantine guard, was in September, 1905, killed near Pensacola by the operation of the cars of the Louisville & Nashville Railroad Company. His widow, Anna Goulding, recovered judgment against the company for the negligent killing in the sum of \$7,000. The errors assigned are the refusal of the affirmative charge requested by the company and the admission of testimony as to the speed of the train before and after the incident.

There was evidence tending to show that the deceased was employed as a quarantine guard during the yellow fever epidemic of 1905, his station being within the freight yards of the company near the city of Pensacola, and he was run down and killed while walking upon the track of the company within a few feet of the “quarantine line,” which extended across the several tracks at that place. His duty was to prevent unauthorized persons crossing that line, and he had been at that post for a week or more, succeeding another guard. His presence, it may reasonably



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be inferred, was known to the company from the fact that he made free use of the shifting engines going to and from the city, and of the company's small office situated near the line and used by the telegraph operator, from which the public was excluded. While it may well be that the freight yard at this point was not a thoroughfare to the general public in such sort as they were invited to make use of it, yet as to this guard there were circumstances from which the jury might infer he was there by invitation or right and entitled to some consideration from those operating the trains. We think, further, that the jury might infer, from the fact that he was a quarantine guard and that the quarantine line extended across the tracks, that it was contemplated he would at times be required to cross those tracks, and that negligence would not as matter of law be imputed to him from the fact that he did not follow the mathematical line, but should vary a few feet either way. It was a place of some danger, it is true; but there he was exercising this police power and authority, without protest on the part of the railroad company.

Under our statute, it is not sufficient to avoid a recovery to show that the deceased was negligent. The injury must have been self-imposed, or caused solely by his negligence. There is no hint in the evidence, nor is it claimed, that the injury was self-imposed; and the question for us is, was the burden cast by the statute upon the railroad company to show that it was free from negligence so fully met as to compel the court to withdraw the question from the jury? A long freight train was backing across the "quarantine line" at night, with no headlight, or ringing of bells or blowing of whistle to warn any person who might be upon the track at that point; without appliances, such as a "cow-catcher" or other means, to avoid running down any one, at a high rate of speed according to some of the evidence. There was evidence that a negro with a lantern was on the foremost car, whose duty it was to signal down the brakes through intermediaries; but this precaution was taken principally for the protection of the train and the property of the railroad company. It was further in evidence that the train was actually going but three or four miles an hour, that this negro saw Mr. Goulding, who was walking the track, three car lengths away in the direction in which the train was moving, and whose hearing was keen, and yet no efficient warning was given either to the engineer to stop the train or to Mr. Goulding to get off the track. Under either theory it seems to us the defendant company has failed to completely overthrow the presumption of negligence.

The only other assignment of error here bore upon the refusal to strike testimony as to the rate of speed at which the train actually ran at this point. There was conflict of testimony as to the rate of speed at the time of the accident; the plaintiff contending that it was at a high rate, and the defendant that it was at a slow rate. One witness testified that the rate of speed was the usual rate, and it was competent to show what that "usual"

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rate was. In our opinion, however, the slow speed makes out a stronger case of negligence than the highest speed put in evidence, and, even if this evidence were improper, it would not call for reversal.

Judgment affirmed.

SHACKLEFORD, C. J., and WHITFIELD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

**SKIRVIN v. LOUISVILLE & N. R. Co.**

(Court of Appeals of Kentucky, March 20, 1907.)

[100 S. W. Rep. 308.]

**Railroads—Injuries to Trespassers.**—Where plaintiff, upon the invitation of his brother, a switch brakeman, attempted to ride upon a portion of a freight train being switched in railway yards, and was injured by a sudden movement of the cars, he could not recover; he being neither a passenger nor a licensee, but a trespasser, and the brakeman having no authority as such to bind the company by any agreement for plaintiff's carriage on such train.

**Same—Duty of Company.\***—Where plaintiff was a trespasser on a portion of a freight train being switched in railway yards, the only duty the company owed was to avoid injuring him on discovering his peril; and, where a brakeman who invited plaintiff to ride on such a car signaled the engineer to start as plaintiff attempted to get on, the company was not liable for plaintiff's injury, where the brakeman was unable to stop the train in time to avoid the injury after discovering plaintiff's peril.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by Omer Skirvin against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

*H. D. Gregory* and *B. F. Graziani*, for appellant.

*Benjamin D. Warfield* and *S. D. Rouse*, for appellee.

O'REAR, C. J. Appellant was invited by his brother, a switch brakeman in appellee's employ, to ride upon one of appellee's freight trains being switched in its yards in Newport. In attempting to get on the train appellant was jerked or thrown off by a sudden movement of the train, which he charges was negligently

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\*For the authorities in this series on the subject of the care due trespassers on trains or street cars, see foot-notes appended to *Massell v. Boston Ele. Ry. Co.* (Mass.), 21 R. R. R. 57, 44 Am. & Eng. R. Cas., N. S., 57; foot-notes appended to *Graham v. Chicago & N. W. Ry. Co.* (Iowa), 20 R. R. R. 811, 43 Am. & Eng. R. Cas., N. S., 811; *Toledo, etc., R. Co. v. Gordon* (C. C. A.), 20 R. R. R. 544, 43 Am. & Eng. R. Cas., N. S., 544.

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done, and with the knowledge at the time by the brakeman aforesaid of appellant's peril. In this suit by appellant to recover damages for his injury, the court peremptorily directed a verdict for the defendant.

Appellant's contention is that he was either a passenger or a licensee. But we think not. The train was a cut of freight cars being switched from one point in the railroad company's yards to another. It was in no sense a passenger train—a fact so obvious that appellant as a person of ordinary intelligence must have been aware of it. A railroad company has the right to regulate its business so as to haul its passengers on one train and its freight traffic upon another. A conductor of a train is the representative agent of the carrier as to the train in his charge, within the scope of the business intrusted to him. A freight conductor might bind his principal as to anything coming within the actual or apparent scope of his duties; but as to matters clearly beyond his duties his attempt to bind the principal is futile for want of legal power. In such matter he is in no sense of the word acting for his master. Clearly a mere brakeman on a freight train, or the member of a switching crew, has not the power, by virtue simply of his position, to bind his employer in a contract for the carriage of passengers on the latter's freight cars. The lack of authority is so patent that any one must take notice of it. The relation of carrier and passenger is one of contract. There must be an agreement by the carrier, and generally a consideration paid by or for the passenger, to bring the relation into being. When it is so created, the law imposes very vigorous obligations upon the carrier as to its provisions for the passenger's safety; for which it is presumed, and doubtless is a fact, the carrier regulates its charges to the passenger, and provides itself with suitable cars and appliances and experienced servants to represent it. On a freight train, and particularly in switching cuts of freight cars in its private yards, there is no offer by the carrier to carry passengers, no provision for their safety, no selection of servants skilled specially in that business, and no charge exacted for the same. To hold that a mere brakeman could, in spite of his lack of authority, impose upon the carrier, without consideration, the grave responsibilities of a carrier of passengers by his voluntary request, his beck or nod, would do violence to every canon of the law of principal and agent. Nor could the servant create the relation of licensee, any more than he could that of passenger, where his lack of authority was apparent.

Appellant's relation to appellee was that simply of a trespasser, to whom it owed only the duty to avoid injuring him when his peril was discovered by it. This means when the peril was discovered by some one of its servants who was in a position to prevent, and had the power to prevent, the injury. The brakeman, although he may have discovered appellant's peril when he fell, or after the train had started, was then without power to stop the train in time to prevent the injury. That the brakeman gave the signal to the engineer to start the train as appellant attempted to get on

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it, was not necessarily negligent, and the manner in which it was done in this case was not negligent at all. Appellant was invited to get on the train so as to ride on it. It had to be moved. The usual method of signaling was as the brakeman did in this case, and the start was in the usual manner of starting. There was no evidence of negligence in the matter.

The judgment is affirmed.

**DUGAN v. BLUE HILL ST. RY. CO.**

(Supreme Judicial Court of Massachusetts, Norfolk, Jan. 2, 1907.)

[79 N. E. Rep. 748.]

**Carriers—Injury to Employee Riding on Pass—Contract Exempting from Liability.\***—Though a condition of a pass, issued to a railway employee as a gratuity, that he assumes all risk of accident, is binding, it is not binding where the pass is issued as one of the terms of his employment.

**Same—Question for Jury.**—Whether or not a pass held by a street railway employee was a gratuity or was issued as one of the terms of his employment, thereby making him a passenger for hire, held, in an action for injuries received by him while riding on a car, to be a question for the jury.

**Appeal—Right of Review.**—Where defendant asked the trial judge to rule on a question of fact as if it were a question of law, he could not complain of the court's ruling thereon.

Exceptions from Superior Court, Norfolk County; Edgar J. Sherman, Judge.

Action by one Dugan against the Blue Hill Street Railway Company. Verdict for plaintiff, and defendant brings exceptions. Overruled.

*Geo. F. Williams*, for plaintiff.

*Gaston, Snow & Saltonstall*, for defendant.

LORING, J. In the first count of the declaration on which alone the plaintiff went to the jury he declared on the ground that he was a passenger for hire. At the trial it appeared that he was a motorman in the employ of the defendant, riding on an errand of his own after his day's work was done, under a pass by the terms of which he assumed all risks of accidents.

The defendant operates an electric car line between Stoughton and Mattapan. The plaintiff entered the defendant's employ in the autumn of 1898 six years before the accident which was on October 10, 1904. When the plaintiff was first employed by the defendant all employees were allowed at all times to ride for

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\*See foot-notes appended to *Feldschneider v. Chicago, etc., Ry. Co.* (Wis.), 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737.

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pleasure or on their own personal business without paying a fare. This continued until January, 1902, as we understand the bill of exceptions. At some time in January, 1902, when the plaintiff went for his week's pay, the paymaster threw out with the envelope containing his pay a pass like the one on which the plaintiff was riding at the time here in question. Each year after that a similar pass was issued in renewal of it.

It appeared that the plaintiff lived at Canton, within three minutes' walk of the defendant's car barn at that place. As we understand it, in going from Mattapan to Stoughton you come to Canton before you reach Stoughton. The plaintiff testified on direct examination that a majority, and on cross-examination that all but one, of the defendant's employees lived in Canton; that the one who did not live in Canton lived in Stoughton; and that it did not make any difference in the rate of wages paid whether they lived in Canton or in Stoughton.

The plaintiff also testified that immediately after his employment: "I rode back and forward to my house and would ride down to my dinner and supper." By this we understand him to mean that he rode from the terminus in Stoughton to the car barn in Canton, and vice versa, to go to his work and to get his dinner and supper and to return to his house on the termination of the day's work.

At the conclusion of the testimony the defendant asked the court to rule that the plaintiff was not a passenger for hire. The presiding judge said, "This seems to be a question of law," to which the defendant's counsel assented; and thereupon the judge said that he should rule against him.

When the presiding judge came to the part of his charge, in which he had to deal with the question of the plaintiff's being or not being a passenger for hire, he said: "I was asked to rule that he was bound by that pass and could not recover. I have to rule one way or the other, it being agreed to be a question of law, and our court have lately passed upon a similar case, and decided that the agreement on the pass does not excuse the defendant, and that they are liable just the same, and I need not go into the reason for that or the explanation. I have seen fit to rule that that does not excuse them, and so he is to be treated as though he were a passenger."

The plaintiff had a verdict, and the case is here on an exception to the refusal to rule that the plaintiff was not a passenger for hire; and secondly, on an exception to the ruling given by the presiding judge on that matter in his charge to the jury.

The rule on which the rights of the parties depend in such cases as that now before us is settled in this commonwealth by the cases of *Quimby v. Boston & Maine Railroad*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846, and *Doyle v. Fitchburg Railroad*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417, and it is this: Where a pass is issued as a gratuity the clause providing that the holder assumes all risk of accidents is binding. *Quimby v. Boston & Maine Railroad*, 150 Mass. 365, 23 N. E. 205, 5 L.

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R. A. 846. But where such a pass is issued to an employee as one of the terms of his employment, the clause is not binding. *Doyle v. Fitchburg Railroad*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417.

Which of these two was the fact in the case at bar was a question for the jury. It well might be found in the case at bar that the custom which had existed for three years at least before the first pass was issued to the plaintiff, by which the employees were to ride free at all times, had come to be generally understood by the railway company and its employees to be an implied as distinguished from an express term but still a term in the contract on which its employees were hired. Whether this inference should or should not be drawn under all the circumstances of the case was for the jury to decide. In this connection it was of importance that the plaintiff did not ask for a pass as a favor; and the way is of some consequence in which (as the plaintiff testified) the pass was first issued, to wit, "it was thrown out" with the pay and "nothing said."

The only question of difficulty in the case is to decide how the exceptions now before us are to be disposed of.

If the only exception taken had been an exception to the refusal of the judge to rule that the plaintiff as matter of law was not a passenger for hire, no difficulty would arise. The exception should be overruled.

But the judge not merely refused to rule that as matter of law the plaintiff was not a passenger for hire. He went further and ruled that as matter of law he was a passenger for hire; and to this the defendant excepted.

Whether the plaintiff was or was not a passenger for hire was, as we have said, a question for the jury; and if there had been nothing else in the case the exceptions taken to the ruling that as matter of law he was a passenger for hire would have to be sustained.

The difficulty arises from the fact that the judge in his charge, after stating that he had been asked by the defendant "to rule that he [the plaintiff] was bound by that pass and could not recover," said: "I have to rule one way or the other, it being agreed to be a question of law." On this bill of exceptions we must take it that this was assented to by the defendant.

If the result of this is that the defendant is to be taken to have asked the presiding judge to rule on this question of fact as if it were a question of law, we cannot say that the judge came to the wrong conclusion; and therefore the exception must be overruled. Again, if the result of this is that the defendant's counsel must be taken to have asked the judge to rule on this as a question of law because he did not care to go to the jury on it if it was a question of fact, the exception must be overruled.

We are inclined to think that the latter is the view which ought to be taken of the exceptions. In either event the entry must be.

Exceptions overruled.



JOHNSTON *v.* CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Wisconsin, Jan. 29, 1907.)

[110 N. W. Rep. 424.]

**Master and Servant—Injuries to Third Persons—Servant's Scope of Authority—Evidence.**—In an action for assault and false imprisonment by a watchman employed by a railway company, evidence held sufficient to authorize a finding that the watchman had authority to look after the safety of the company's passenger cars.

**Principal and Agent—Authority of Agent—Delegation of Duties.**—A general agent of a railway company who had authority to look after the safety of passenger cars and investigate any damage done to them, and sometimes made the investigation himself and sometimes through subordinates and did not get special authority from his superior officers for each investigation but had such authority as general agent, could give a watchman, employed by the railway, authority to make the investigation.

**Appeal—Harmless Error—Instructions.**—In an action against a railway company for assault and false imprisonment by a watchman who arrested plaintiff for throwing sticks at a train, any error in a charge that, if it was the duty of the watchman to look after passenger cars, such authority embraced the effort to discover offenders whose prosecution was possible, was harmless where the evidence showed that the watchman had authority to make an investigation as to damage done the company's property.

**Master and Servant—Injuries to Third Persons—Servant's Scope of Authority.\***—Where a watchman employed by a railway company was authorized to investigate the matter of the throwing of sticks at passenger cars, his act in arresting plaintiff on a charge of throwing sticks at a train was within the scope of his authority so as to render the railway company responsible therefor.

Appeal from Superior Court, Douglas County; C. Smith, Judge.

Action by William Johnston, by guardian, against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This action was brought by the plaintiff, a minor, through his guardian against the defendant to recover for an assault and false imprisonment. The plaintiff on November 19, 1904, with some

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\*For the authorities in this series on the question whether a railroad company is liable for the arrests or prosecutions made or instigated by its servants or agents, see foot-note appended to *Milton v. Missouri Pac. Ry. Co.* (Mo.), 18 R. R. R. 653, 31 Am. & Eng. R. Cas., N. S., 653; *Baltimore & O. R. Co. v. Deck* (Md.), 18 R. R. R. 640, 41 Am. & Eng. R. Cas., N. S., 640; foot-notes appended to *Evans v. Atlantic Coast Line Ry.* (Va.), 18 R. R. R. 624, 41 Am. & Eng. R. Cas., N. S., 624.

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other boys, was playing on or near the right of way of defendant, and while one of the passenger trains was passing one of the boys threw a stick at it, striking the trucks of one of the cars. The following afternoon one Gallagher, a watchman of the defendant, went to the home of plaintiff, placed his hand on plaintiff's shoulder and said he wanted to talk with him; they went around in front of the house and Gallagher asked plaintiff to go to jail, whereupon the boy broke away and ran to the house. Gallagher followed, threatening to shoot him, finally caught him, and asked him if he was the boy who threw the stick at the train, which the boy denied. Gallagher afterwards took him to the house of one of the other boys who was present at the time the stick was thrown, then took him to the city hall, where he was questioned relative to throwing the stick, and also in reference to stealing coal. It is claimed by plaintiff that Gallagher was acting within the scope of his authority, and therefore defendant is liable for such assault and false imprisonment. The complaint alleges, in substance, that defendant maliciously and with intent to injure plaintiff, with force and arms, assaulted him, and then and there directed and caused him to be seized and laid hold of with force and violence, and then and there, without any reasonable or probable cause whatever, and without any writ, warrant, or legal process of any kind for so doing and against the will of plaintiff, unlawfully, wrongfully, and maliciously took him and forced and compelled him to go in and along divers streets in the city of Superior, to the rooms occupied by the police department, and then and there against the will of plaintiff unlawfully, wrongfully, maliciously, and falsely imprisoned him for about one hour, and then and there confined him in said room and restrained him of his liberty, without any writ, warrant, or legal process, against the will of plaintiff. Defendant denied generally the allegations of the complaint. The case was tried by the court and a jury and the jury found for the plaintiff in the sum of \$250. Judgment was rendered upon the verdict, from which this appeal was taken.

*Solon L. Perrin and Nelson J. Wilcox (Thomas Wilson, of counsel), for appellant.*

*George C. Cooper and George E. Dietrich, for respondent.*

KERWIN, J. (after stating the facts). The errors relied upon by appellant and discussed raise the following questions: (1) Whether the night watchman, Gallagher, had authority to investigate the matter of throwing the stick at defendant's car; and (2) whether Gallagher was acting within the scope of his authority when he arrested and imprisoned the plaintiff. Whether Gallagher was acting within the scope of his duty and had authority to protect passenger cars were submitted to the jury. The jury were instructed that, if they found it was the duty of Gallagher to look after passenger cars, his authority embraced efforts to discover offenders whose prosecution was possible. It is conceded that Gallagher was employed by defendant as watch-

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man at the Superior yards, where the alleged offense under investigation was claimed to have been committed. There is evidence that it was part of his duties to prevent property from being stolen, and see that property was not damaged. The evidence also shows that the general agent, Grochau, instructed Gallagher to investigate and report on the matter of throwing at the train. It is contended, however, by appellant that Grochau had no authority to employ Gallagher to investigate, and that Gallagher's acts in that regard were not within the scope of his duty as agent of defendant. The point is made by counsel for defendant that Grochau had no authority to hire or discharge men only for the purpose of handling freight and baggage and selling tickets, and that Gallagher was hired through authority from defendant's superintendent. It is true that the superintendent by letter instructed Grochau to employ a watchman at a fixed rate per day, but the duties of the watchman were not specifically defined by the superintendent. The fact that Grochau had no authority without instruction from the superintendent to hire or discharge a watchman did not interfere with his right to use such servant under his supervision for the purpose of aiding him in the performance of his duties. Aside from the fact that Grochau testified to his authority to investigate matters of injury to passenger cars, and his general duties in that regard, the question of Gallagher's authority to look after the safety of the car in question was submitted to the jury, and the jury were told that, if Gallagher did not have such authority, plaintiff could not recover. So the authority of Gallagher to look after the safety of the car in question, we think, is established upon sufficient evidence by the verdict of the jury. It is also conclusively established by the evidence that Gallagher made the investigation under Grochau and as his subordinate. So we come to the question of the authority of Grochau to authorize such investigation. The evidence is that Grochau was general agent at Superior, and had authority to look after the safety and protection of passenger cars, and to look after and investigate any damage done to them; that he had at times looked after matters of damage to property of defendant and had made investigation and reported to his superior officers; that he made investigation respecting injury to defendant's property, sometimes himself and sometimes through subordinates, and did not get special authority from his superior officers for each investigation, but had such authority as general agent, and had general supervision of the office of the company and its depot at Superior. It seems clear from the undisputed evidence that Grochau as general agent of the company had authority to cause the investigation in question to be made, and could make the investigation himself, or take to his assistance the watchman, Gallagher.

The principal error complained of is the charge to the jury to the effect that, if they found it was Gallagher's duty to look after the passenger cars, such authority embraced the effort to discover offenders whose prosecution was possible, and, if such

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acts were done by Gallagher in way of examining into the case for the purpose of discovering the offenders, they were within the scope of his authority, provided he had authority to protect passenger cars. This portion of the charge is severely criticised by counsel for appellant, on the ground that it in effect stated to the jury that authority to an agent to "protect and look after" his master's property rendered the master liable for acts similar to those complained of in this action. The criticism is not without force. It is at least a serious question whether such authority would bring the agent within the scope of his duty in making the investigation complained of. *Mali v. Lord et al.*, 39 N. Y. 331, 100 Am. Dec. 448; *Cosgrove v. Ogden et al.*, 49 N. Y. 255, 33 m. Rep. 361; *Allen v. London & S. W. R. Co.*, 6 Q. B. 65; *Carter v. Howe M. Co. (Md.)* 34 Am. Rep. 311; *Golden v. Newbrand et al. (Iowa)* 2 N. W. 537, 35 Am. Rep. 257; 3 Elliott on Railroads, § 1265; *Dolan v. Hubinger*, 109 Iowa, 408, 80 N. W. 514; *Feneran v. Singer M. Co. (Sup.)* 47 N. Y. Supp. 284; *Pressley v. Mobile & G. R. Co. (C. C.)* 15 Fed. 199; *President, etc., of Baltimore & Y. T. Road v. Green (Md.)* 37 Atl. 642; *Gilliam v. South & N. A. R. Co.*, 70 Ala. 268; *Daniel v. Atlantic C. L. R. Co. (N. C.)* 48 S. E. 816, 67 L. R. A. 455; *Georgia R. & B. Co. v. Wood (Ga.)* 47 Am. St. Rep. 146; *Singer M. Co. v. Hancock*, 74 Ill. App. 556. But this portion of the charge, even if error, was not prejudicial to the defendant, since the evidence establishes that Grochau had authority to cause the investigation to be made through his subordinate, and that Gallagher acted by authority of Grochau. Besides, the court charged the jury that the burden was upon the plaintiff to prove, by a preponderance of the evidence, and to reasonable certainty, that Gallagher was the agent of the defendant, and acted within the scope of his authority in the matter complained of; and further that they must find that the acts complained of were done in a way of examining into the case in order to discover the offenders. If the facts established a naked authority to look after and protect property and nothing more, a very different question would be presented. But, as we have seen, the authority under which Gallagher acted was not merely to protect and look after passenger cars, but to investigate past transactions. The question, therefore, arises whether Gallagher was acting within the scope of his authority when he assaulted and imprisoned the plaintiff with a view solely of endeavoring to ascertain who committed the offense. He was acting under authority to investigate and report. Grochau testified: "I asked him to investigate this matter of throwing sticks, and report to me. I asked him to investigate and give me all the particulars he could find out. I sent him out to investigate it and report to me." No limitation was placed upon the manner of investigation, or methods to be employed in obtaining information, and it appears that the investigation made was for the purpose of obtaining the desired information. Investigate is defined: "To inquire into systematically; ascertain by careful research." *Standard Dictionary*, p. 917. "To search out; to inquire into;

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to examine; to scrutinize." Worcester's Dictionary, p. 777. "To follow up; to pursue; to search into; to inquire and examine into with care and accuracy; to find out by careful inquisition." Webster's Dictionary, p. 713. "Investigation denotes inquiry either by observation, experiment or discussion." Wright v. Chicago, 48 Ill. 290. But it is contended that authority to investigate does not imply authority to do unlawful acts in the execution of such duty, and that, when Gallagher unlawfully assaulted and imprisoned the plaintiff, he was not within the scope of his duty. But, since he had authority to investigate, and was thus engaged, his acts, though unlawful, were binding upon his master. A master is liable for the tortious act of the servant done in the scope of his employment, though the master did not sanction it, or even though he forbade it. Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) 468, 14 L. Ed. 502; Bergman v. Hendrickson *et al.*, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47.

In Chicago C. R. Co. v. McMahon, 103 Ill. 485, 42 Am. Rep. 29, a servant was employed to collect evidence for the master in a pending litigation, and while so engaged offered a bribe to a witness, and it was held that such act was binding upon his master. The court said: "He was empowered generally to perform that duty, without special directions. That part of the business of the company was placed in his charge, with the general authority to use his judgment in its performance. His acts, therefore, were the acts of the company within the scope of his employment. His legal authority, of course, but extended to lawful acts. So it is true of all agencies, as they are not appointed for the purpose of committing wrongs, or the performance of illegal acts, except in rare cases. Few actions would be maintainable if a recovery could be had only in cases where express authority is given, or the agent is required to commit the wrong." The rule seems to be well settled that, where the servant is engaged in the performance of a duty delegated to him by the master, his tortious acts, within the scope of his authority, though unlawful, unauthorized, or even forbidden, are binding upon his master. Craker v. Chicago & N. W. R. Co., 36 Wis. 657, 17 Am. Rep. 504; Bergman v. Hendrickson *et al.*, *supra*; Cobb v. Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909; Eichengreen v. Louisville & N. R. Co. (Tenn.) 34 S. W. 219, 31 L. R. A. 702, 54 Am. St. Rep. 833; Evansville & T. H. R. R. Co. v. McKee, 22 Am. & Eng. Railroad Cases, 366; Chicago C. R. Co. v. McMahon, *supra*. In Bergman v. Henderson *et al.* 106 Wis. 436, 82 N. W. 304, 80 Am. St. Rep. 47, this court said: "If Backstrom committed the assault for the purpose of collecting payment for his master's liquor, he was within the scope of his employment. It was his method of performing the duty delegated to him, and, although the method may not have been either expressly authorized or even contemplated, nay, although it may have been expressly prohibited, yet the master is liable for the damages caused thereby, provided he has intrusted to the servant the duty he was



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attempting to perform. *Craker v. C. & N. W. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Schaefer v. Osterbrink*, 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875; *Rogahn v. Moore M. & F. Co.*, 79 Wis. 573, 48 N. W. 669; *Reinke v. Bently*, 90 Wis. 457, 63 N. W. 1055; *Bryan v. Adler*, 97 Wis. 124, 72 N. W. 368, 41 L. R. A. 658, 65 Am. St. Rep. 99." This language is peculiarly applicable to the case before us. Gallagher was authorized to investigate respecting a past offense. He assaulted and imprisoned the plaintiff for the sole purpose of obtaining the information sought after through the investigation. He was performing his duty in his own way, and although the methods employed were unlawful and unauthorized, they were within the scope of his duty and were, therefore, the acts of the master.

We therefore hold that Grochau had authority to cause investigation to be made of offenses against the defendant's property, and that Gallagher was acting within the scope of his authority when he made the investigation; that the acts complained of being done in executing the master's duty, though unauthorized and unlawful, were the master's acts, for the consequences of which it is liable. It follows that the judgment of the court below must be affirmed.

The judgment of the court below is affirmed.

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**WABASH R. CO. v. KITHCART.**

(Circuit Court of Appeals, Eighth Circuit, November 21, 1906.)

[149 Fed. Rep. 108.]

**Master and Servant—Injuries to Servant—Brakeman—Petition—Allegations of Negligence.**—In an action for injuries, plaintiff, a brakeman, alleged that in complying with the orders of his superior he was compelled, by reason of a defective coupling rod, to step between the cars in order to uncouple them, and while doing so his foot was caught in an open unblocked frog in the track; that the injury was occasioned because of the negligent and careless construction of defendant's track in failing to properly block the frog, and that the accident was solely caused by reason of defendant's negligence in failing to properly construct and maintain its track at the point of the accident. Held, that the petition was insufficient to raise an issue of negligence in maintaining a defective coupling appliance.

**Same—Negligence—Unblocked Frogs.\***—Where, in an action for injuries to a brakeman by his foot becoming caught in an unblocked frog, there was undisputed proof that on some of the railroad systems in the state and elsewhere it was customary to leave frogs unblocked, and on others to block them, and the frogs on some parts of defendant's lines were blocked and on others not, and also that there was a

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\*See generally, foot-notes appended to *Van Blarcom v. Central R. Co.* (N. J.), 17 R. R. R. 699, 40 Am. & Eng. R. Cas., N. S., 699.



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fair difference of opinion among practical railroad men as to which was the safer practice, defendant's failure to block the frog in question did not constitute actionable negligence.

In error to the Circuit Court of the United States for the Southern District of Iowa.

*James P. Hewitt* (*Geo. S. Grover* and *Carr*, *Hewitt, Parker & Wright*, on the brief), for plaintiff in error.

*Halloran & Starkey* and *Thomas A. Cheshire*, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. Kithcart recovered a judgment against the railroad company for personal injuries sustained in the state of Iowa while in its service and in the performance of his duties as a brakeman. The averments of negligence in his petition are contained in the following paragraphs:

"That in complying with the said orders of his superior officer, he was compelled, by reason of a defective coupling rod, to step between the cars in order to uncouple the same, and while between the said cars, in the act of uncoupling the same, his foot was caught and held fast in an open or unblocked frog or guard rail in and on the track of the defendant company.

"That said accident and injury was occasioned the plaintiff because of the negligent and careless construction by the defendant company of its track, in failing to properly block the said frog or guard rail of the switch, located at the point and place of the happening of said accident.

"That said accident occurred solely by reason of the carelessness and negligence of the defendant company, as stated above, in failing to properly construct and maintain its said track at said point of said accident, and the plaintiff was wholly free from contributing in any degree whatever to the same by reason of any negligent or careless acts upon his part."

At the conclusion of the evidence the court denied a request of the railroad company for a directed verdict in its favor, and also refused to give an instruction that there could be no recovery because of a defective coupling rod as a ground of negligence. On the contrary, the court instructed the jury that there were two charges of negligence in the petition, upon either of which a recovery might be had if the evidence warranted it—first, a defective coupling appliance, and, second, a failure to block the frog. In this the court erred. The petition does not charge the defective condition of the coupling appliance as a substantive ground of negligence. The first of the paragraphs quoted from the petition is not an assertion of negligence on the part of the company. It merely sets forth a reason why the plaintiff went between the moving cars, and its purpose was to relieve him from the charge of contributory negligence. *Morris v. Railway*, 47 C. C. A. 661, 108 Fed. 747. This is manifest, because there is nothing more in the averment than a mere statement that a coupling

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rod was defective. It is not averred that the company was in any wise negligent in respect thereof, and for aught that appears the company may have been most diligent in the performance of its duties of inspection and maintenance. The purpose of the pleader not to rely upon the defect except as mere inducement to plaintiff's action in going between the cars is further shown by his failure to aver either that the cars were employed in interstate commerce, so that the act of Congress in respect of safety appliances would apply, or that they were employed in commerce within the state, so that a statute of Iowa upon the same subject could be invoked. Moreover, the evidence received during the trial went no further than to show the bare fact that the safety appliances were defective. The other paragraphs of the petition afforded further proof, if any is needed, that the plaintiff rested his case solely upon a charge of negligence in respect of the condition of the track. In the second of those quoted he directly charges that the accident and the injury were occasioned because of the failure to properly block the frog or guard rail of the switch, and in the third he says that the accident occurred solely by reason of negligence in failing to properly construct and maintain its track at the point of the accident. Counsel endeavor to escape from this obvious conclusion by claiming that such averments were mere "opinions and conclusions of law," and should therefore be wholly disregarded. Were this true (though manifestly it is not), the plaintiff would have a petition stripped of every averment of negligence on the part of the defendant, and his right of recovery would be rested upon inadmissible inferences and presumptions.

As to the failure of the railroad company to block the frog at the switch where the plaintiff was injured: Without recapitulating the testimony of the witness, it is sufficient to say that there was undisputed proof that on some of the railroad systems in Iowa and elsewhere it was the custom to leave frogs unblocked, and on others it was the custom to block them. The frogs on some parts of the defendant's lines of road were blocked, and on others not blocked. The particular frog in which plaintiff's foot was caught had never been blocked. The evidence also showed that there was a fair difference of opinion among practical railroad men as to which was the safer practice. The case was therefore brought fully within the rule announced by the Supreme Court and by this court in *Southern Pacific R. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391; *Morris v. Railway*, 47 C. C. A. 661, 108 Fed. 747; *Kilpatrick v. Railroad*, 57 C. C. A. 255, 121 Fed. 11, affirmed by the Supreme Court in 195 U. S. 624, 25 Sup. Ct. 789, 49 L. Ed. 349; *Gilbert v. Railway*, 63 C. C. A. 27, 128 Fed. 529.

When such a diversity of theory and practice in the construction and maintenance of railroads reasonably exists, a company confronted by the problem is at liberty to adopt that course which, in the judgment of its officers, is least productive of danger to all whose safety is to be considered, and its selection of plan or

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method is not at the risk of being held guilty of negligence. In the Kilpatrick Case the petition charged that the railway company negligently allowed the coupling appliances on the cars to become defective and out of repair; that because thereof the plaintiff's husband, a brakeman, had to go between the moving cars to uncouple them; that while doing so, and in the exercise of due care, his foot was caught in the unblocked space between a guard rail and a main rail of the track, and he was so injured that death ensued; that the unblocked space was dangerous, and the company was negligent in so maintaining it. At the trial, however, the plaintiff's attorneys stipulated that the failure to block the frog was the proximate cause of the injury, and that plaintiff would rely solely thereon, and not upon the other ground, namely, that the coupling appliances were out of repair. It will at once be perceived that this stipulation reduced the case to the position occupied by the one at bar. At the conclusion of the evidence in that case the trial court directed a verdict for the defendant upon the authority of *Southern Pacific R. Co. v. Seley*, *supra*. The judgment which followed was affirmed by the Court of Appeals in the Indian Territory (64 S. W. 560), by this court, and finally, by the Supreme Court, all holding that the Seley Case was controlling.

In *Union Pacific R. Co. v. James*, 6 C. C. A. 217, 56 Fed. 1001, affirmed in 163 U. S. 485, 16 Sup. Ct. 1109, 41 L. Ed. 236, relied on by plaintiff, the principle announced in the Seley Case and in the cases which follow it was not invoked. The sole issue tried was whether a particular frog was blocked or unblocked at the time of the accident, and the trial court assumed in its charge to the jury that the unblocked frog was an unsafe appliance, and constituted negligence in itself. No exception was taken to that feature of the charge, and its correctness was not reviewed by the appellate courts.

The request of the Railroad Company for directed verdict should therefore have been granted.

The judgment is reversed, and the cause is remanded for a new trial.

CURTIN *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 27, 1907.)

[80 N. E. Rep. 522.]

**Master and Servant—Injuries to Servant—Question for Jury.**—Where a street car conductor was killed, while standing on the fender of the car to adjust the trolley, by the movement of the car, and it was claimed that the motorman touched the controller or the brake as he was assisting the conductor, which the motorman denied, whether the conductor was in the exercise of ordinary care, and whether the motorman in fact accidentally started the car, were for the jury.

**Same—Res Ipsa Loquitur.\***—Where a street car conductor was injured by the sudden starting of the car as he was standing on the fender to adjust a trolley, and the cause of the starting was not proved, there being nothing to show that it was not in perfect condition at the time of the accident, the mere happening of the accident was insufficient to establish a prima facie case of defendant's negligence.

Exceptions from Superior Court, Suffolk County; Lloyd E. White, Judge.

Action by Patrick J. Curtin, as administrator of John F. Curtin, deceased, against the Boston Elevated Railway Company to recover for the conscious suffering and death of plaintiff's intestate, a conductor, on defendant's road, who, in April, 1901, was caught and crushed between two of defendant's cars. At the close of plaintiff's evidence, the court ruled that plaintiff could not recover, and directed a verdict for defendant, and plaintiff brings exceptions. Overruled.

*Elder & Whitman and James Thomas Pugh*, for plaintiff.  
*Endicott P. Saltonstall*, for defendant.

MORTON, J. Whether the plaintiff's intestate was in the exercise of due care or not in standing on the fender to adjust the trolley was clearly, we think, a question for the jury, as was also, we think, the question whether the motorman accidentally touched the controller or the brake as he was assisting plaintiff's intestate and thereby caused the car to start. The motorman testified that he was positive that he did not touch the controller and the jury could have found that the car started in some other

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\*See foot-notes appended to *St. Louis, etc., R. Co. v. Hill* (Ark.), 21 R. R. R. 20, 44 Am. & Eng. R. Cas., N. S., 20; foot-notes appended to *Hemphill v. Buck Creek Lumber Co.* (N. Car.), 20 R. R. R. 411, 43 Am. & Eng. R. Cas., N. S., 411; *Fitzgerald v. Southern Ry. Co.* (N. Car.), 20 R. R. R. 368, 43 Am. & Eng. R. Cas., N. S., 368; foot-notes appended to *Northern Pac. Ry. Co. v. Dixon* (C. C. A.), 20 R. R. R. 242, 43 Am. & Eng. R. Cas., N. S., 242.

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way, though the more reasonable explanation would seem to have been that the car was started inadvertently by the motor-man as he leaned forward to take hold of the trolley rope to assist plaintiff's intestate. We also assume in favor of the plaintiff that if the car started of itself it would be some evidence of a defect. But we see no evidence of negligence on the part of the defendant in failing to discover the defect if there was one. There was nothing to show that the car had ever started before from a state of rest. There was nothing to show that the car was not in first-class condition before the accident and the undisputed evidence was that it went to the end of the route after the accident "perfectly properly." The only cause of the accident which the expert who was called by the plaintiff suggested was that there might have been a short circuit somewhere. But if there was a short circuit neither he nor any one else attempted to show how it occurred or that it could have been discovered by the exercise of proper care on the part of the defendant. On the contrary the expert admitted, in effect, that he never knew of a car being started by a short circuit and that though he had heard of a car starting of itself he never could see any evidence of a short circuit in such cases. The cause of the accident was, therefore, wholly a matter of conjecture. Cases where negligence has been inferred from the happening of the accident do not apply. In those cases the circumstances were such that the jury were justified in inferring in the absence of any explanation that according to common experience the accident would not have happened except for the defendant's fault. But where, as here, even if the accident may be evidence of a defect somewhere, the cause of the accident remains wholly a matter of conjecture and no one can say in the absence of explanation either from common experience or otherwise that it happened through the fault of the defendant. The doctrine of *res ipsa loquitur* does not apply. The mere happening of an accident under such circumstances never has been held enough of itself to render the defendant liable. *Kenneson, Adm'r, v. West End St. Ry. Co.*, 168 Mass. 1, 46 N. E. 114; *Hofnauer v. R. H. White Co.*, 186 Mass. 47, 70 N. E. 1038; *Faulkner v. B. & M. R. R.*, 187 Mass. 254, 72 N. E. 976. In *Byrne v. Boston Woven Hose Co.*, 191 Mass. 40, 77 N. E. 696, one of the latest of the cases relied on by the plaintiff, there was testimony tending to show that the machine had been broken, and repaired, and that it was impossible for it to start from a full stop unless there was some defect in the belt or the machine itself, and manifestly if there was failure to discover it could properly be imputed to the defendant's negligence. And in *Hebblethwite v. Old Colony St. Ry. Co.*, 192 Mass. —, 78 N. E. 477, the latest case relied on, the circumstances were clearly such as to warrant a finding that there was a lack of proper care on the part of the defendant.

Exceptions overruled.

UNION PAC. R. Co. *et al.*, *v.* EDMONDSON.

(Supreme Court of Nebraska, Dec. 7, 1906.)

[110 N. W. Rep. 650.]

**Master and Servant—Injury to Servant—Defective Appliances.\*—**

In an action for damages caused by alleged defects in defendant's machinery, evidence of the same defective condition, immediately before and after the accident complained of, is admissible for the purpose of proving the condition of the machinery; and as to its prior condition, for the additional purpose of showing knowledge on the part of the defendant.

**Evidence—Res Gestæ.†—**In an action for the negligent killing of an employee by a railroad company, alleged as the result of a defective condition in the engine, evidence of a declaration of the engineer in charge regarding such defective condition, made at the time, and under such circumstances as to raise the presumption that it was an unpremeditated and spontaneous explanation of the casualty, is admissible as a part of the *res gestæ*.

**Appeal—Review—Misconduct of Counsel.—**To obtain a review of the rulings of the district court on objections to alleged misconduct of counsel in addressing the jury, the record must show, not only that objections were made, but the matter objected to, and the rulings of the court thereon.

**Trial—Introduction of Evidence.—**The district court may permit a party to withdraw his rest and introduce additional evidence when it appears that the same is required in the furtherance of justice and no undue advantage is thereby acquired over the adverse party.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Error to District Court, Platte County; Hollenbeck and Reeder, Judges.

"Not to be officially reported."

Action by Lillie Edmondson, administratrix of Cameron Edmondson, against the Union Pacific Railroad Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

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\*See extensive note, 19 R. R. R. 275, 42 Am. & Eng. R. Cas., N. S., 275.

†For the authorities in this series on the question whether the declarations of railroad employees are *res gestæ*, see foot-notes appended to *Robinson v. Old Colony St. Ry. Co.* (Mass.), 21 R. R. R. 860, 44 Am. & Eng. R. Cas., N. S., 860; *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 20 R. R. R. 631, 43 Am. & Eng. R. Cas., N. S., 631; foot-notes appended to *Lexington St. Ry. v. Strader* (Ky.), 20 R. R. R. 273, 43 Am. & Eng. R. Cas., N. S., 273; foot-notes appended to *Wallace v. North Alabama Trac. Co.* (Ala.), 19 R. R. R. 804, 42 Am. & Eng. R. Cas., N. S., 804; foot-notes appended to *Leach v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 212, 42 Am. & Eng. R. Cas., N. S., 212.



## Union Pac. R. Co. v. Edmondson

*John N. Baldwin and Edson Rich*, for plaintiff in error.  
*John J. Sullivan*, for defendants in error.

EPPERSON, C. Cameron Edmondson, a brakeman in the employ of the defendant company, was thrown from the top of a freight car by the sudden stopping or slacking of the train on which he was employed, and was instantly killed beneath the car. The administratrix of his estate brought this action to recover damages, alleging that the death was the result of defendant's negligence in maintaining a defective air pump and apparatus attached to the engine in control of the train. It was further alleged that defendant Herod was in the employ of his codefendant, and that it was his duty to see that the engine was kept in good order, and was safe and fit for use. The undisputed evidence shows the following facts: At the time of the accident the train was engaged in switching at Spalding in this state. In the course of the switching, the deceased, as his duty required, gave a signal for a service or gradual stop. In response, the engineer properly adjusted the lever. There was a change in the motion of the train, and the deceased, who was standing near the rear end of the last car, in a train of about 11 cars, was thrown to the ground and killed. Plaintiff's theory is that, on account of the defective condition of the machinery, the train, instead of coming to a service stop, came to an emergency or sudden stop, which was the proximate cause of Edmondson's death. Plaintiff recovered \$3,000 in the court below, and defendants bring error.

Defendants contend that the court erred in admitting evidence of the defective condition of the engine, from three to six days subsequent to the injury, arguing that such evidence was not proper for the purpose of showing negligence on the part of the defendants. The evidence was given by a former employee of the defendant company and is as follows: "Q. Do you remember the occasion while you were in the employ of the Union Pacific Railroad Company that engineer Dolan started out with his engine, and, after having gone some distance on his trip, he returned with the engine to the roundhouse, and leaving it there for repairs, and taking out another engine to complete his run? A. I remember of his bringing the engine back to the roundhouse shortly after the accident in which Mr. Edmondson was killed." So far this testimony only shows that the engine was taken from the roundhouse and returned. Reasons for its return are not apparent. The evidence was, without more, immaterial, but was not prejudicial. Continuing, this witness gave testimony, objected to, in substance as follows: "I don't know much about the air, but I know it was out of repair quite often. Q. Do you know it was ever reported for repairs? A. Not positively. Of course I saw some reports. \* \* \* I noticed once he [the engineer] made a report for the air pump to be fixed. \* \* \* That was shortly after Mr. Edmondson was killed. \* \* \* It might have been three days

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afterwards, and it might have been six." It is a rule lately followed in most courts where this question has been considered that evidence of subsequent repairs to machinery alleged to have caused an injury is incompetent as proof that the defendant was guilty of negligence. *Columbia & Puget Sound R. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; *Wigmore on Evidence*, vol. 1, § 283; 1 *Elliott on Evidence*, § 186; *Morse, Adm'x v. M. & St. L. R. Co.*, 30 Minn. 465, 16 N. W. 358. The evidence was, however, proper for the purpose of showing the defective condition of the machinery. It was incumbent upon the plaintiff to show the dangerous condition of the machinery, the defendants' knowledge thereof, and their negligence in maintaining the same. In *Labbatt on Master and Servant*, § 820, it is said, in part: "But a more logical theory is embodied in the statement that, in an action by an employee against an employer for an injury caused by a defect in the plant, it is not necessary to adduce evidence of the condition of the plant at the precise moment the casualty occurred, and that it is enough to prove such a state of facts shortly before or after the casualty as will induce a reasonable presumption that the condition was unchanged."

Defendants also except to evidence showing that within 30 days prior to the accident the apparatus in question failed to respond properly and that its defective operation was the same as at the time of the accident. The same rule applies to this testimony as to the evidence regarding the subsequent condition of the machinery; and it is admissible for the additional purpose of showing knowledge on the part of the defendants. In *Findley Brewing Company v. Bauer*, 35 N. E. (Ohio) 55, 40 Am. St. Rep. 686, it was held: "In an action by an employee against his employer for damages resulting from an injury received in operating a machine caused by its defective condition, the defects being charged to the negligence of the employer, it is competent to prove that on a former occasion, while it was being operated by another, the machine worked in a manner similar to when the plaintiff was injured. But such evidence is only competent to prove the defective character of the machine, and the employer's knowledge of the fact; it is not competent to prove actionable negligence on the part of the employer at the time the plaintiff was injured. Being competent for one purpose, its admission over a general objection was proper." The defendant failed to ask for an instruction limiting the consideration of the evidence by the jury and may not now complain that it was admitted without qualification. 1 *Elliott on Evidence*, § 151.

During the trial, plaintiff called several witnesses who testified that at the time of the accident, and when the dead body of Edmondson was discovered by the engineer in charge of the train, he said: "My God! There must be something the matter with the air. It has bothered me ever since I left Genoa." Defendants objected to this evidence, and now contend that its

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admission was reversible error. The engineer had been in charge of the train from Genoa to Spalding, the place of the accident. He was in control of the engine, though not personally operating it, when Edmondson was killed. He was in the line of his duty when he made the statement. Defendants contend that the statement, if made, was only the conjecture of the engineer as to a possible cause of the accident, and for that reason was not admissible as a part of the *res gestæ*. The exclamation, in our opinion, was a statement of a fact, or a declaration made under circumstances as to raise the presumption that it was the unpremeditated and spontaneous explanation of the fatal accident. Being such, it was a part of the *res gestæ* under the rule often followed by the court. *U. P. R. R. Co. v. Elliott*, 54 Neb. 299, 74 N. W. 627; *M. P. R. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Collins v. State*, 46 Neb. 38, 64 N. W. 432; *City of Friend v. Burleigh*, 53 Neb. 674, 74 N. W. 50. The testimony objected to being proper, we reach the conclusion that the verdict was sustained by sufficient evidence. Defendants present no theory of the accident, and the inference deducible from the evidence is consistent with plaintiff's theory.

Defendants contend that a new trial should be granted on account of alleged misconduct of plaintiff's counsel. During the cross-examination of one of defendant's witnesses, the engineer, plaintiff's counsel asked: "Before the man was cold, before the blood stopped flowing, you directed Speice, to hunt up evidence, didn't you?" The only objection interposed was that it was incompetent, irrelevant, and immaterial. The question was not answered. Then followed: "Was the man's body cold, before you directed Speice to look around for evidence?" This was objected to as "incompetent, irrelevant, and immaterial and asked for the purpose of prejudicing the jury." This objection was overruled. We do not think this question would necessarily prejudice the defendants in the minds of the jurors. This, however, seems to have been the object of counsel and such conduct might well have been reprimanded by the court. The facts brought out might have affected the credibility of the witness as showing his interest. Such purpose of the query would be legitimate. It seems to us that the question was not so plainly prejudicial as to require reversal of the judgment.

During the argument of the case to the jury by plaintiff's counsel, certain statements were objected to by defendants as improper. To some of the objections no ruling was made by the court, but counsel was told to confine his argument to the evidence. No definite ruling was asked for the defendants, nor did they request an instruction directing the jury to disregard the remarks of counsel. The prejudicial statements do not appear in the record. Not only should the record show the objections made, but also the matter objected to, the rulings of the court thereon. In the case of *C., B. & Q. R. R. Co. v. Kellogg*, 54 Neb. 134, 74 N. W. 454, this court after citing many prior decisions pertaining to the conduct of attorneys in the argument

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of cases to the jury, said: "These cases establish the further proposition that the defeated party in a litigation, in order to take advantage of the alleged misconduct of opposing counsel, must call the attention of the trial court to such conduct at the time it occurs, ask the trial for protection therefrom, preserve in a bill of exceptions the alleged misconduct of counsel, with the rulings of the trial court, and the party's exceptions thereto, and present the record of what occurred and the rulings of the trial court as an assignment of error in the proceedings brought here." In the case at bar, the records only show the objections made. This is sufficient to show that the statements appearing in the objection were in fact made by counsel. Neither can we conclude that the district court erred in the matter, as his rulings do not appear of record, nor did the defendants insist upon a ruling. In *C., B. & Q. R. R. Co. v. Krayenbuhl*, 98 N. W. (Neb.) 44, it was held: "Alleged misconduct of counsel in addressing the jury must be objected to when the language is used, and a ruling of the trial court procured on such objection, and an exception saved to the ruling, to make the objection available in this court."

After plaintiff rested her case, defendant asked for a directed verdict. This request was denied. The court thereupon permitted plaintiff to withdraw her rest and introduce proof showing the administrative capacity of the plaintiff. It is established as a rule of practice in this state that the trial court may permit a party to withdraw his rest and introduce additional evidence when the same is required in the furtherance of justice and no undue advantage thereby acquired over the adverse party. *Tomer v. Densmore*, 8 Neb. 384, 1 N. W. 315; *McClellan v. Hein*, 56 Neb. 600, 77 N. W. 120; *F., E. & M. V. R. R. Co. v. Crum*, 30 Neb. 70, 46 N. W. 217. The action of the trial court in permitting additional testimony to be introduced was not an abuse of discretion.

We find no error in the record and recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

McCALLION *v.* MISSOURI PAC. RY. CO. *et al.*

(Supreme Court of Kansas, Dec. 8, 1906.)

[88 Pac. Rep. 50.]

**Railroads—Injury to Employee of Another—Defective Car Furnished to Employer.\***—A railway company which furnishes a defective car to the employer of another is not liable in damages for injuries to the servant of the employer caused by such defect when the employer knew of the defect in time to have repaired the same, or to have warned the servant, but neglected to do either.

**Negligence—Contributory Negligence.†**—It is not contributory negligence, as a matter of law, for one who is placed in a dangerous position by another's negligence to adopt in a sudden emergency a perilous alternative in an endeavor to avoid danger to himself or to others, although it may turn out that he should have acted differently.

(Syllabus by the Court.)

Error from District Court, Butler County; G. P. Aigman, Judge.

Action by Peter C. McCallion against the Missouri Pacific Railway Company and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

The Missouri Pacific Railway Company owns and operates a line of railway into and through Butler county, with a side track leading to a stone quarry and crusher which are owned and operated by Frazier & Vanderhoof. Plaintiff in error, Peter C. McCallion, was in the employ of Frazier & Vanderhoof, working in and about the quarry and stone crusher. It became a part of his duty to run ballast cars down the side track to the crusher. The grade of the side track leading to the crusher was descending, and brakes were required on the ballast cars to stop them, and hold them in position. The cars were placed on the side track by the railway company and, when needed for use in loading, were managed and controlled by the employees of Frazier & Vanderhoof. Plaintiff in error brought this action against the owners of the quarry and the railway company for injuries received by him while operating one of the ballast cars. His petition alleged, among other things, that the cars, after being placed upon the side track by the railway company, were brought down the side track to the crusher by the force of gravity, when needed to be loaded; that on the 20th day of April, 1903, he started down with one of the cars towards the crusher; that immediately after starting the car he saw another ballast car on

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\*See foot-notes appended to *Risque's Adm'r v. Chesapeake & O. Ry. Co.* (Va.), 20 R. R. R. 306, 43 Am. & Eng. R. Cas., N. S., 306.

†Foot-notes appended to *Alabama Great Southern R. Co. v. Fulton* (Ala.), 20 R. R. R. 311, 43 Am. & Eng. R. Cas., N. S., 311; *Root v. Kansas City Southern Ry. Co.* (Mo.), 20 R. R. R. 171, 43 Am. & Eng. R. Cas., N. S., 171; foot-notes appended to *Firebaugh v. Seattle Electric Co.* (Wash.), 19 R. R. R. 107, 42 Am. & Eng. R. Cas., N. S., 107.

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the side track at the crusher with a man standing thereon; that he attempted at once to stop his car by putting on the brake; that the brake was defective in not having any brake chain, so that his attempt to stop the car by means of the brake failed; that he then jumped from the car to the ground, and seized a pinch bar, an appliance furnished him by his employers, and which was used for starting and stopping cars, and attempted to stop the car by placing the pinch bar between the wheel of the car and the rail, but the car had acquired such a speed by its momentum that it ran over the pinch bar causing it to strike his foot with such violence as to break his foot and ankle, and ran over and upon his right leg crushing it so that amputation was necessary. It was alleged that the injury was caused wholly by the negligence of defendants in supplying a car with a defective brake, and that the defendants, Frazier & Vanderhoof, the owners of the quarry, each personally knew of the defects in the ballast car on the day prior to the occurrence of the injury, and that defendant Missouri Pacific Railway Company had a reasonable opportunity to know of the defects at the time the car was placed on the side track. Separate demurrers were filed by the railway company and the other defendants, both of which were sustained. Plaintiff elected to stand upon his petition, and brings these proceedings in error.

*N. W. Bowman* and *John Davis*, for plaintiff in error.

*J. H. Richards*, *C. E. Benton*, and *Mooney & Stratford* (*Hamilton & Leydig*, of counsel), for defendants in error.

PORTER, J. (after stating the facts). The motion to dismiss the proceedings on the ground that the case made was not served within the time required by law is disposed of by the case of *Anna Gerdorn et al. v. Frank Durein* (just handed down) 88 Pac. —. We will first consider the demurrer of the railway company. It is argued that as plaintiff in error was not in the employ of the railway company, it had no control over his actions, and that the negligence charged against the railway company upon the ground of the defective brake on the ballast car is not sufficient to constitute a cause of action against it. The contention is that the causal connection between the negligence alleged on the part of the railway company and plaintiff's injury was broken by the alleged negligence of plaintiff's employers. In other words assuming that the railway company was negligent in furnishing a defective car to Frazier & Vanderhoof, it is said that its negligence could not have been the proximate cause of the injury. The petition shows that the employers of plaintiff had taken possession of the defective car at the time he was injured, and it is argued that, under the allegations of the petition and the law of master and servant, the master was responsible to the servant, and its negligence was the proximate cause of the injury. In *Railway Co. v. Merrill*, 65 Kan. 436, 70 Pac. 358, 59 L. R. A. 711, 93 Am. St. Rep. 287, a brakeman in the employ of one railway company was injured by a defective car furnished to his employer by another company. It was held that the



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railway company in whose employ the brakeman was at the time of the injury, having failed to discharge its obligation to inspect cars received from another company, the casual connection between the act of the company first guilty of negligence in furnishing the car and the injury had been severed by the interposition of an independent agency. The company furnishing the defective car was held in that case not liable for injuries to the employee of the company receiving the car. Plaintiff seeks to recover a joint tort—the negligence of the railway company in furnishing the defective car to the master combined with the negligence of the master in knowingly furnishing it to him. The question involved is elaborately discussed, and the cases in point quite fully collated in the Merill Case, *supra*. Under the rule laid down in that case, it is clear that plaintiff has no cause of action against the railway company. The causal connection between the alleged negligence of the railway company and his injury under the allegations of his petition, was broken by the intervening negligent acts of his employer. The demurrer of the railway company to the petition was properly sustained.

A different question arises with reference to the demurrer of the other defendants in error (Frazier & Vanderhoof). It is said that they are not liable because they did not furnish the car, and are not responsible for its defective condition; that it was not their duty to inspect cars furnished them or repair those found to be defective because they had no authority to remove the car from the side track. But it is the duty of the master to furnish his employee with reasonably safe tools and appliances for the performance of the work assigned to him. *Bridge Co. v. Miller*, 71 Kan. 13, 40, 80 Pac. 18. The fact that they were not originally responsible for the defective condition of the car did not relieve them of the duty to provide their employees with reasonably safe appliances. In *Labatt on Master & Servant*, vol. 1, p. 372, it is said: "Both on principle and authority it is clear that a master is answerable for defects in any instrumentalities which he has temporarily taken over from the owner, and made a part of his own plant. In such cases the elements of possession and the exercise of control are decisive. Manifestly, no distinction can logically be based upon the bare circumstances that he has a merely qualified right of property in them. So far as regards his obligations to his servants, he must be considered as the owner *pro tempore*. This principle is applicable whether he has borrowed the appliance in question, or has hired it for a specific consideration, or has taken possession of it for a definite or indefinite period, with a view to the performance of certain work in which he and the owner are both interested." Whether it was their duty to inspect cars when received, it is not necessary to decide. The petition alleged that they had actual notice of the defective condition of the car for at least a day prior to the injury.

A case very similar is that of *Spaulding v. Flynt Granite Co.*, 159 Mass. 587, 34 N. E. 1134. Plaintiff there was in the em-

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ploy of a stone company and was bringing a car loaded with stone from defendant's quarry on a side track leading to a connection with the Boston & Albany railway. The car was moved by gravitation and, after starting, plaintiff found he was unable to control the car with the brake. The car ran away with him, and he was injured. An action was brought against his employer, the stone company. Defense was made that the car was furnished by the railway company; that defendant was required to take what cars it could get, and was, therefore, not liable to plaintiff. The court said: "This car was used by the defendant, as one of the instruments of its business. When that is the case, it does not matter whether the defendant owns the thing used, or borrows it. The responsibility of the master to his servants is the same either way."

A further contention is that the petition shows such contributory negligence on the part of plaintiff as bars his right to recover. Whether plaintiff was negligent in attempting to stop the car by means of the pinch bar, is, we think, under the circumstances, a question of fact to be determined by the jury. The court was not warranted in saying, as a matter of law, that plaintiff was guilty of contributory negligence in not abandoning the car, and seeking his own safety. While there is no allegation that the man on the other car was in danger, yet a reasonable construction of the petition leaves it fairly to be inferred that plaintiff's attempt to stop the car was to avoid danger to another as well as destruction of property. Where one is placed in a dangerous position by the negligence of another, and, in sudden emergency, adopts a perilous alternative in an endeavor to avoid danger to himself or to others, he is not guilty of contributory negligence, as a matter of law, although as it turns out he should have acted differently. *Railroad Co. v. Langley*, 70 Kan. 453, 461, 78 Pac. 858; *Edgerton v. O'Neil*, 4 Kan. App. 73, 46 Pac. 206; 1 *Shearman & Redfield on Negligence*, § 8). It follows from what has been said that the court erred in sustaining the demurrer of defendants, *Frazier & Vanderhoof*.

The judgment will be affirmed as to defendant railway company; as to the other defendants the judgment will be reversed, and the cause remanded with directions to overrule their demurrer. All the Justices concurring.

**JOYCE v. GREAT NORTHERN RY. CO. (two cases).**

(Supreme Court of Minnesota, March 1, 1907.)

[110 N. W. Rep. 975.]

**Constitutional Law—Class Legislation.\***—Rev. Laws 1905, § 5097, declaring it unlawful for two or more employers of labor to combine or confer together for the purpose of preventing any person from procuring employment, construed, and held a valid legislative enactment.

**Torts—Interference with Employment.**—If one employer by conference with another employer prevents, without excuse or justification, a third person from procuring employment with such other employer, he is liable for damages under the statute to the person so interfered with.

**Same—Malice.**—A malicious motive or purpose is essential to give rise to a cause of action under the statute; not actual malice, but such as the law implies from the fact that the act complained of was unlawful and without justification.

**Same—Evidence.\***—Plaintiff had been in the employ of the Union Depot Company as a track repairer. He was injured while engaged in the discharge of his duties by being struck by a switch engine of defendant, then being operated in the depot company's yards. On recovering from his injury, he sought re-employment of the depot company. Defendant interfered, and by its act induced the depot company to refuse him further employment, except upon the condition that he release defendant from all claim for damages on account of his injury. He declined to release his claim, and the depot company, in consequence of the interference of defendant and plaintiff's refusal to release, refused to re-employ him. Held, that the act of defendant, on the evidence disclosed, was a violation of the statute, and constituted, unexplained by matters in justification, an actionable tort, and the question should have been submitted to the jury under the second cause of action.

**Railroads—Injury to Person on Track.**—Evidence presented in the record in support of plaintiff's first cause of action examined, and held insufficient to sustain the verdict of the jury to the effect that plaintiff's injury was caused by the negligence of defendant's servants in operating the engine which struck him at an excessive rate of speed.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Oscar Hallam, Judge.

Actions by Thomas S. Joyce against the Great Northern Railway Company. Verdict for plaintiff on the first cause of action, and case dismissed as to the second cause of action. From an

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\*See generally, *Wabash R. Co. v. Young* (Ind.), 12 R. R. R. 361, 35 Am. & Eng. R. Cas., N. S., 361, and foot-note.

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order denying motion for judgment notwithstanding the verdict, or a new trial, defendant appeals; and from an order denying a new trial as to the second cause of action, plaintiff appeals. Reversed on both appeals.

*J. P. Kyle*, for plaintiff.

*M. L. Countryman*, for defendant.

BROWN, J. Plaintiff seeks to recover damages upon two separate causes of action, viz.: (1) For injuries to his person caused by the alleged negligence of defendant and its servants; and (2) for the wrongful and unlawful conduct of defendant in preventing him from obtaining employment from the Union Depot Company. The court, at the conclusion of plaintiff's case, dismissed the second cause of action on the ground that the evidence was insufficient to justify a recovery by plaintiff; but a verdict was returned in his favor on the first cause of action for \$906. Defendant appealed from an order denying its motion for judgment notwithstanding the verdict, or for a new trial; and plaintiff appealed from an order denying a new trial as to the second cause of action.

1. The facts in reference to plaintiff's second cause of action are as follows: Defendant Great Northern Railway Company and the Union Depot Company are separate corporations, organized and existing under the laws of this state. The depot company owns and operates the Union Station in the city of St. Paul, including the station buildings, a train shed, and numerous railroad tracks leading to the same, over which the several railroad companies making use of the station, including the Great Northern Company, operate their trains in and out of the depot. The railway companies are tenants of the depot company, paying rentals for the use of its tracks and station, though the Great Northern Company has the exclusive use of three tracks leading thereto. The several roads own and operate their own switch engines in the depot yards in the movement of their trains and cars. At the time of the accident resulting in the injury of plaintiff, he was, and for some time prior thereto had been, in the employ of the depot company as a track repairer; his duty being to assist in the repair of the yard tracks, and other work which might from time to time be assigned to him. The injury received by him necessitated a severance of those relations, and for all practical purposes of the case he has never since been in its employ. On recovering from his injury, he applied to the depot company for re-employment, was promised a position by the yard foreman of the company, and told to report for work the following Monday, subject to the approval of the superintendent. At about this time the claim agent of the Great Northern Company, after investigating the injury received by plaintiff and the cause thereof, it having been occasioned by one of the switch engines of that company, wrote and caused to be delivered to the superintendent of the depot company the following letter: "The Great Northern Railway Line. Great

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Northern Railway. Montana Central Railway. Duluth, Watertown & Pacific Railway. Wilmar & Sioux Falls Railway. Claim Department. St. Paul, Minn., July 18th, 1905. W. G. Bissell, Claim Agent. Mr. Jos. Strawhorn, Supt. St. P. Union Depot, City—Dear Sir: Referring to accident to laborer T. S. Joyce in St. Paul yards the 13th, beg to advise that I have made an investigation of this accident and fail to see that any one was to blame for same, unless it was the injured man. It appears that Joyce, when first seen, was about 100 feet from engine on engineer's side; that he apparently saw engine and stepped to other side of track out of view of engineer. Engineer was ringing bell, and fireman was shoveling coal, and neither knew that the man had been struck. Under the circumstances, the only thing that I can do in this case is to pay bills for medical and surgical attention and take release from him for same. I enclose release herewith, and would ask, before this man is allowed to resume work, that same be executed, securing two witnesses to it, and returning same to me for my file. Yours truly, W. G. Bissell, Claim Agent." Plaintiff reported for work in accordance with the suggestion of the yard foreman, and was referred to the superintendent, by whom he was informed that he would not be re-employed unless he released the Great Northern Company from all claim for damages on account of the injury heretofore referred to. He refused to release the railway company, and the depot company declined to re-employ him. The superintendent of that company, who had authority to employ and discharge men, testified on the trial that he refused plaintiff re-employment because of and in consequence of the suggestion from the claim agent of the railway company, and plaintiff's refusal to comply therewith. He did not demand that plaintiff sign any particular form of writing, either releasing the railway company upon payment of the medical and surgical bills referred to in the letter, or otherwise. He refused plaintiff employment simply because he would not release that company, and this by reason of the interference of the claim agent. The complaint alleges in this connection that the railway company is a rich, powerful, and influential corporation; that it has for many years used the railroad tracks and terminals of the depot company, paying a large rental therefor; that in consequence of the relations existing between the two companies the railway company has been able to, and does, influence and control the depot company in the operation and management of its affairs; and that it used such power and influence on the occasion in question wrongfully and unlawfully to prevent the plaintiff from obtaining employment with that company. The trial court dismissed this cause of action on the theory that the railway company had sufficient interest in the men employed by the depot company in and about the yards to justify it in making a request of the kind contained in the letter of the claim agent, and was justified in taking such interest and seeing that persons antagonistic to or having litigation with it should not

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be employed by the depot company in a capacity where their services involved duties toward the railway company.

2. That the wrongful and malicious interference by a stranger with contract relations existing between others, by causing one to commit a breach thereof, amounts to an actionable tort, is affirmed by nearly all the courts of the present day. The old rule that the remedy in such cases was an action against the party to the contract who committed the breach, and not against the wrongful intermeddler, is not now the law, either in this country or in England. That rule has been extended and enlarged, and an action *ex delicto* against the mischievous wrongdoer is now sustained by nearly all the courts (*Queen v. Leatham*, App. Cases [1901] 495; *Lumley v. Gye*, 2 El. & Bl. 216; *Walker v. Cronin*, 107 Mass. 555; *London Guarantee Co. v. Horn*, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 108 Am. St. Rep. 499), though the old rule is still the law of some of the states (*Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165; *Glencoe Co. v. Hudson Com. Co.*, 138 Mo. 439, 40 S. W. 93, 36 L. R. A. 804, 60 Am. St. Rep. 560). Some eminent judges and courts have insisted with persuasive argument that such wrongful interference for the purpose of preventing the formation of contracts is equally actionable. *May v. Wood*, 172 Mass. 14, 51 N. E. 191; *Graham v. Ry. Co.*, 47 La. Ann. 214, 16 South. 806, 27 L. R. A. 416, 49 Am. St. Rep. 366; *Gibbon v. Labor Union*, 72 L. J. K. B. Div. 907; *Temperton v. Russell*, 1 Q. B. Div. 715; 16 Am. & Eng. Ency. Law, 1114, and cases cited. The precise question has never come before this court, though we had an analogous case before us in *Gray v. Building Trade Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477. We there held, as respects a boycott, that it was immaterial whether contract relations actually existed between the person boycotted and his customers; that it was equally unlawful to prevent him from obtaining customers with whom he could contract, as to interrupt existing relations, and such is the law in other states. *Vegelahn v. Guntner*, 167 Mass. 94, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Jersey City v. Cassidy* (N. J. Ch.) 53 Atl. 230. But it is unnecessary to pursue this feature of the case further, or to inquire whether the common law does or does not afford a remedy against an intermeddler in cases where he does not interfere with existing contract relations, but only prevents their formation. The question is removed from doubt or conjecture by section 5097, Rev. Laws 1905. This statute was not referred to in the court below, nor cited on the original argument in this court. Attention was called to it by a member of the court in consultation, and, rather than decide the case without opportunity of counsel to be heard upon the question whether it applied to the facts at bar, we called for additional briefs. We could not, knowing of its existence, well ignore the statute.



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3. Though the complaint was not framed in view of the statute, its allegations are broad enough to bring the case within its operation. The statute, as found in the Revised Laws of 1905, was taken from chapter 174, p. 391, Laws 1895, and, while the phraseology of the original enactment is somewhat changed in the revision, it is to all intents and purposes practically the same. The portion here material provides as follows: "It shall be unlawful for any two or more employers or any two or more corporations, to combine or to agree to combine or confer together for the purpose of interfering with or preventing any person or persons from procuring employment, either by threats, promises, or by circulating or causing to be circulated blacklists, or for the purpose of procuring and causing the discharge of any employee or employees by any means whatsoever." It is contended by defendant that the sole object and purpose of this statute was to prevent conspiracy on the part of employees designed to coerce their employers. We do not so construe the statute. The title to the act, it is true, tends to show that the statute was intended originally to be limited to preventing the practice on the part of employers of blacklisting, coercing, or unduly influencing their employees; but the title is not the sole guide in construing the enactment thereunder. That portion of the statute here under consideration is pertinent to the subject-matter expressed in the title, and goes far beyond the restrictive view given by defendant's counsel. The violent strife in recent years between employers and employees respecting the rights and obligations of each to the other has brought from the Legislatures of many of the states numerous enactments for the purpose of ameliorating the condition of the employee on the one hand and protecting the property and property rights of the employer on the other. These the courts have sustained on the broad ground that every citizen is entitled to the equal protection of the law, and that it is a legitimate exercise of legislative power to prescribe rules defining and establishing distinctions respecting the rights, obligations, and duties of employers and employees as a class. Public attention has repeatedly been called to the alleged wrongful and malicious conduct of employers in interfering with the free exercise of the will of employees in pursuing their calling, particularly in efforts to prevent them from obtaining employment where they may, of which blacklist cases furnish an illustration. On the other hand, the Reports are full of decisions respecting the wrongful and unlawful acts of employees, through labor unions, in coercing and influencing the action of employers by boycotts and other equally wrongful and unlawful means. The statute under consideration is in line with other similar legislation designed to in a measure remedy existing evils, and was undoubtedly intended as a further check on employers, and to declare their acts, in so far as taken for the purpose of preventing laborers from obtaining employment, unlawful. It provides that it shall be unlawful for any two or more employers to combine, or agree to combine, or confer to-

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gether, for the purpose of interfering or preventing any person from obtaining employment, either by threats, promises, or by circulating, or causing to be circulated, a blacklist. The facts in this case show a conferring together by the two corporations for the purpose of preventing plaintiff from procuring employment with the depot company. The letter of the claim agent to that company may be construed as a request on the part of the railway company that plaintiff be not re-employed, except on condition that he release his claim for damages against it; and he was denied employment because he refused to comply with the condition. Though the agents of the two companies did not meet and confer together personally, or agree to combine, it is a fair question for the jury to determine, on the facts disclosed, whether there was not a conference within the meaning of the statute. The validity of this statute was sustained in *State ex rel. v. Justus*, 85 Minn. 279, 88 N. W. 759, 56 L. R. A. 757, 89 Am. St. Rep. 550. Although this particular part of the statute was not there before the court, the decision made applies, and sustains the view that it is not unconstitutional. It applies to employees as a class, operates equally upon all, and is not, therefore, obnoxious to constitutional principles. Its basic principle is found in the declaration of our fundamental law that there shall be a certain remedy for all wrongs, and the further general rule that every wrongful act of a person which causes temporal loss or damage to another is an actionable tort. *Graham v. Railway Co. (La.)* 16 South. 806, 27 L. R. A. 415, 49 Am. St. Rep. 366.

4. The statute is not, however, to be given a literal application; that is, it should not be so construed or applied that a rightful interference in preventing a person from obtaining employment with a particular employer would constitute a violation of its provisions. Conditions might exist between two employers that an interference to prevent the employment of a particular person would be perfectly justifiable. To constitute an actionable wrong under the statute, therefore, it should appear that the interfering employer was actuated by malice or an evil intent toward the person interfered with. Statutes of this character, declaring a particular act wrongful and unlawful, which do not expressly make malice or evil intent an essential ingredient, are enlarged by construction, and an element of malice incorporated therein by the courts in furtherance of natural right and justice. Or, as expressed in the case of *Hobe v. Swift*, 58 Minn. 84, 59 N. W. 831, the courts "spell the defense of good faith into the statute." *Price v. Dennison*, 95 Minn. 106, 103 N. W. 728. A person may take such action in furtherance of his own interests, in the preservation and protection of his property rights, as circumstances may require, and so long as he does not act maliciously toward, or unreasonably or unnecessarily interfere with the rights of his neighbor, he cannot be charged with actionable wrong, whatever may be the result of his conduct in pursuing his own welfare. Malice is therefore essential to the right of

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action under the statute; not express malice, but such as the law implies in such cases from the fact that the act complained of was unlawful. Malice, under the common acceptation of the term, means ill will against a person; but in its legal sense, as applied to statutes like this, it means an unlawful act, done intentionally without just cause or excuse. 16 Am. & Eng. Ency. Law, 1112. The unlawfulness of the act gives rise to a presumption of legal malice, which is sufficient to support an action for the wrong. And in the case at bar it must be held that defendant is not liable under the second cause of action, if under the circumstances disclosed it was justified in the conduct complained of. The trial court, as already noted, held that defendant had such an interest in the conduct of the affairs of the depot company as to justify it legally in requesting that company to refuse plaintiff re-employment, unless he would release his right to damages for the injury referred to. It may be conceded that the railway company is vitally interested in the management of the depot and depot yards, and that it may properly interfere and insist that no incompetent or unworthy persons be employed therein; and, if such was the foundation of its conduct here in question, no liability exists. But we are unable to concur in the view that, upon the facts now before the court, its conduct was justified as a matter of law. To justify an act of interference of this sort, it must be founded upon some lawful object. *Walker v. Cronin*, 107 Mass. 555. This does not appear. There is no suggestion in the record that plaintiff was incompetent for the duties assigned him, nor that his employment would be detrimental to the railway company in the operation of its trains in the depot yards. The only reason, so far as the evidence discloses, for the interference of the company in preventing his employment, was to induce or coerce him into releasing his right to damages. He had made no claim for damages at this time. The company assumed, probably rightfully, that one would be made, and it sought in this manner to relieve itself therefrom. This, standing alone, was a wrongful object within the contemplation of law, and insufficient as a justification. But it is further contended that plaintiff's injuries were the result of his own negligence, that his claim against the railway company was without merit, and its assertion justified the company in objecting to his further retention by the depot company. In considering this feature of the justification, too much stress should not be laid upon the fact that plaintiff had at the time of the interference complained of made no claim for damages. It may fairly be said that the company was justified in assuming that a claim would be made, and plaintiff's refusal to release it shows that he intended to demand redress for his injury. If defendant's position in this respect be sustained by a fair view of the evidence, a question for the jury, and it be found that plaintiff's claim for damages was wholly without merit, or if the circumstances surrounding the accident be such as to justify the belief on the part of the company that it was

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without merit, and was about to be wrongfully asserted against it, such facts would fully justify it in interfering to prevent plaintiff's further retention as an employee of the depot company. Its relations with that company are of such a nature as to justify it in opposing the employment of persons who, when injured by their own fault, assert meritless claims for damages and involve the company in litigation.

5. It follows that the second cause of action should not have been dismissed. It should have been tried out and sent to the jury, if the evidence presented a right of recovery within the statute and principles of law referred to. The letter from the claim agent to the depot company, operating as it did to cause the latter to refuse plaintiff re-employment, if within the scope of his authority, was, unexplained by matters in justification, *prima facie* a violation of the statute and sufficient to justify a recovery. The extent of the authority of the claim agent was not made a question on the trial below, nor was it ruled upon by the trial court. The meager evidence presented in this record will not justify us in holding that he exceeded his authority.

6. The facts with reference to the first cause of action, on which plaintiff recovered a verdict, are substantially as follows: As already stated, plaintiff was in the employ of the depot company as a track repairer. While in the discharge of his duties he was struck by a switch engine operated by defendant and seriously injured. The acts of alleged negligence on which he relies for recovery, are (1) that the servants of defendant in charge of the switch engine negligently failed and omitted to ring the bell as it approached plaintiff, or give other warning of its approach; and (2) that the said servants negligently and carelessly operated the engine at an excessive rate of speed—it being contended that both these acts were in violation of custom theretofore established and followed in the yards in the operation of switch engines, upon which plaintiff had the right to rely. The court submitted the case to the jury on both these theories, saying to them that if they found the alleged custom to exist, and that it was violated either by failing to ring the bell or by operating the engine at an excessive rate of speed, plaintiff might recover. The evidence is sufficient to take the question of custom and the failure to ring the bell to the jury, but we think it insufficient to justify recovery by plaintiff on the theory of negligence in operating the engine at an excessive rate of speed. Plaintiff testified that he was engaged in repairing one of the tracks used exclusively by defendant, and that while so engaged he was struck by the engine and injured; that he did not observe the engine approaching him, and did not know of the fact that it was approaching until it struck him. In view of this fact, it is obvious that he did not rely on this occasion upon an observance of the custom of operating engines in the yards at a certain rate of speed, eight miles an hour, and the excessive speed, therefore, had no casual connection with the accident. If plaintiff had seen the engine approaching, he would have been

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entitled to rely upon the custom as to speed and to regulate his movements accordingly. The evidence here before us is insufficient to warrant the submission of this feature of the case to the jury. The question of contributory negligence and assumption of risk were for the jury.

Order reversed upon both appeals, and new trial granted.

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CATHERINE SCHLEMMER, Plff. in Err. v. BUFFALO, ROCHESTER, & PITTSBURG RAILWAY COMPANY.

(Argued January 18, 21, 1907. Decided March 4, 1907.)

[27 Sup. Ct. Rep. 407.]

**Error to State Court—Federal Question—Decision on Non-Federal Ground.**—A state court, by deciding that a railway employee who was killed while attempting to make a coupling with a car not equipped with an automatic coupler, as required by the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, was, as a matter of law, guilty of contributory negligence in lifting his head a little too high after he had been warned of the danger, cannot defeat the appellate jurisdiction of the Federal Supreme Court, where § 8 of that statute was specially invoked as excluding the defense of assumption of risk.

**Master and Servant—Duty as to Appliances—Automatic Coupler.\***—A shovel car is a "car" within the meaning of the act of March 2, 1893, § 2, requiring any car used in moving interstate traffic to be equipped with an automatic coupler.

**Evidence—Burden of Proof.**—The burden of proof is upon a carrier to bring itself within the exception in favor of four-wheeled cars which is made by the proviso in § 6 of the automatic coupler act of March 2, 1893.

**Master and Servant—Assumption of Risk—Automatic Coupler Act—Contributory Negligence.†**—The possibility that a railway employee, while attempting to make a coupling with a car not equipped with an automatic coupler, as required by the act of March 2, 1893, § 2, might miscalculate the height to which he might safely raise his head, is so inevitably and clearly attached to the risk which, under § 8 of that statute, he does not assume, as to prevent a court from holding, as a matter of law, that he was guilty of contributory negligence which

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\*For the authorities in this series on the subject of the application of automatic coupler acts, see foot-notes appended to *Southern Ry. Co. v. Simmons* (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572.

†For the authorities in this series on the subject of the effect of contributory negligence or assumption of risk by, the injured servant on the right to recover under an employers' liability act, see foot-notes appended to *Southern Ry. Co. v. Blanford's Adm'x* (Va.), 21 R. R. R. 646, 44 Am. & Eng. R. Cas., N. S., 646.



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would defeat any recovery in lifting his head a little too high after being warned of the danger.

In error to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas for the County of Jefferson, in that state, granting a nonsuit in an action for the death of a railway employee who was killed while attempting to make a coupling with a car not equipped with an automatic coupler. Reversed.

See same case below, 207 Pa. 198, 56 Atl. 417.

The facts are stated in the opinion.

*Messrs. Luther M. Walker* (by special leave), *Frederic D. McKenney*, *Edward A. Moseley*, and *A. J. Truitt*, for plaintiff in error.

*Messrs. Marlin E. Olmsted*, *C. H. McCauley*, and *A. C. Stamm*, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court:

This is an action for the death of the plaintiff's intestate, Adam M. Schlemmer, while trying to couple a shovel car to a caboose. A nonsuit was directed at the trial and the direction was sustained by the supreme court of the state. The shovel car was part of a train on its way through Pennsylvania from a point in New York, and was not equipped with an automatic coupler in accordance with the act of March 2, 1893, chap. 196, § 2, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174. Instead of such a coupler it had an iron drawbar fastened underneath the car by a pin and projecting about a foot beyond the car. This drawbar weighed about 80 pounds and its free end played up and down. On this end was an eye, and the coupling had to be done by lifting the free end possibly a foot, so that it should enter a slot in an automatic coupler on the caboose and allow a pin to drop through the eye. Owing to the absence of buffers on the shovel car and to its being so high that it would pass over those on the caboose, the car and caboose would crush anyone between them if they came together and the coupling failed to be made. Schlemmer was ordered to make the coupling as the train was slowly approaching the caboose. To do so he had to get between the cars, keeping below the level of the bottom of the shovel car. It was dusk, and in endeavoring to obey the order and to guide the drawbar he rose a very little too high, and, as he failed to hit the slot, the top of his head was crushed.

The plaintiff, in her declaration, alleged that the defendant was transporting the shovel car from state to state, and that the coupler was not such as was required by existing laws. At the trial special attention was called to the United States statute as part of the plaintiff's case. The court having directed a nonsuit with leave to the plaintiff to move to take it off, a motion was made on the ground, among others, "that under the United States statute, specially pleaded in this case, the decedent was not deemed to have assumed the risk, owing to the fact that the



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car was not equipped with an automatic coupler." The question thus raised was dealt with by the court in overruling the motion. Exceptions were allowed and an appeal taken. Among the errors assigned was one "in holding that the shovel car was not a car used in interstate commerce or any other kind of traffic,"—the words of the court below. The supreme court affirmed the judgment in words that we shall quote. We are of the opinion that the plaintiff's rights were saved and that we have jurisdiction of the case, subject to certain matters that we shall discuss.

On the merits there are two lesser questions to be disposed of before we come to the main one. A doubt is suggested whether the shovel car was in course of transportation between points in different states, and also an argument is made that it was not a car within the contemplation of § 2. On the former matter there seems to have been no dispute below. The trial court states the fact as shown by the evidence, and testimony that the car was coming from Limestone, New York, is set forth, which, although based on the report of others, was evidence, at least, unless objected to as hearsay. *Damon v. Carrol*, 163 Mass. 404, 408, 409, 40 N. E. 185. It was the testimony of the defendant's special agent employed to investigate the matter.

The latter question is pretty nearly answered by *Johnson v. Southern P. Co.* 196 U. S. 1, 16, 49 L. ed. 363, 368, 25 Sup. Ct. Rep. 158, 161. As there observed: "Tested by context, subject-matter, and object, 'any car' meant all kinds of cars running on the rails, including locomotives. . . . The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars." These considerations apply to shovel cars as well as to locomotives, and to show that the words "used in moving interstate traffic" should not be taken in a narrow sense. The later act of March 2, 1903, chap. 976, 32 Stat. at L. 943, U. S. Comp. Stat. Supp. 1905, p. 603, enacting that the provision shall be held to apply to all cars and similar vehicles, may be used as an argument on either side; but, in our opinion, indicates the intent of the original act. 196 U. S. 21, 49 L. ed. 371, 25 Sup. Ct. Rep. 158. There was an error on this point in the decision below.

A faint suggestion was made that the proviso in § 6 of the act, that nothing in it shall apply to trains composed of four-wheel cars, was not negatived by the plaintiff. The fair inference from the evidence is that this was an unusually large car of the ordinary pattern. But, further, if the defendant wished to rely upon this proviso, the burden was upon it to bring itself within the exception. The word "provided" is used in our legislation for many other purposes beside that of expressing a condition. The only condition expressed by this clause is that four-wheeled cars shall be excepted from the requirements of the act. In substance it merely creates an exception, which has been said to be the general purpose of such clauses. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 36, 37, 48 L. ed. 860,

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865, 866, 24 Sup. Ct. Rep. 563. "The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it," etc. *Ryan v. Carter*, 93 U. S. 78, 23 L. ed. 807, 809; *United States v. Dickson*, 15 Pet. 141, 165, 10 L. ed. 689, 698. The rule applied to construction is applied equally to the burden of proof in a case like this. *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538; *Com. v. Hart*, 11 Cush. 130, 134.

We come now to the main question. The opinion of the supreme court was as follows: "Whether the act of Congress . . . has any applicability at all in actions for negligence in the courts of Pennsylvania is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence, and the judgment is affirmed on his opinion on that subject." [207 Pa. 202, 56 Atl. 419.] It is said that the existence of contributory negligence is not a Federal question, and that, as the decision went off on that ground, there is nothing open to revision here.

We certainly do not mean to qualify or limit the rule that, for this court to entertain jurisdiction of a writ of error to a state court, it must appear affirmatively that the state court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. *Bachtel v. Wilson* (Jan. 7, 1907) 204 U. S. 36, ante, 243, 27 Sup. Ct. Rep. 243. But, on the other hand, if the question is duly raised and the judgment necessarily, or, by what appears, in fact involves such a decision, then this court will take jurisdiction, although the opinion below says nothing about it. *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173. And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. *Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. Rep. 767. The application of this rather vague principle will appear as we proceed.

It is enacted by § 8 of the act that any employee injured by any car in use contrary to the provisions of the act shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use had been brought to his knowledge. An early, if not the earliest, application of the phrase "assumption of risk" was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well-known case of *Farwell v. Boston & W. R. Corp.*, 4 Met. 49, 57, 58, 38 Am.

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Dec. 339. But, at the present time, the motion is not confined to risks of such negligence. It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions and by statutes like § 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist.

Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as convertible terms. *Patterson v. Pittsburg & C. R. Co.* 76 Pa. 389, 18 Am. Rep. 412. We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound.

To recur for a moment to the facts: The only ground, if any, on which Schlemmer could be charged with negligence, is that when he was between the tracks he was twice warned by the yard conductor to keep his head down. It is true that he had a stick, which the rules of the company required to be used in coupling, but it could not have been used in this case, or at least the contrary could not be and was not assumed for the purpose of directing a nonsuit. It was necessary for him to get between the rails and under the shovel car as he did, and his orders con-

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templated that he should do so. But the opinion of the trial judge, to which, as has been seen, the supreme court refers, did not put the decision on the fact of warning alone. On the contrary, it began with a statement that an employee takes the risk even of unusual dangers if he has notice of them and voluntarily exposes himself to them. Then it went on to say that the deceased attempted to make the coupling with a full knowledge of the danger, and to imply that the defendant was guilty of no negligence in using the arrangement which it used. It then decided in terms that the shovel car was not a car within the meaning of § 2. Only after these preliminaries did it say that, were the law otherwise, the deceased was guilty of contributory negligence; leaving it somewhat uncertain what the negligence was.

It seems to us not extravagant to say that the final ruling was so implicated with the earlier errors that on that ground alone the judgment should not be allowed to stand. We are clearly of opinion that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk. The negligence, if any, came later. We doubt if this was the opinion of the court below. But suppose the nonsuit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, because it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name. If a man not intent on suicide, but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position, to direct a heavy drawbar moving about him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local courts, we are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment should be reversed.

Judgment reversed.

STATE, to Use of MILLER, *v.* WESTERN MARYLAND R. Co.

(Court of Appeals of Maryland, Feb. 13, 1907.)

[65 Atl. Rep. 635.]

**Master and Servant—Contributory Negligence—Known Dangers.\***

—Where an employee of a railway company, voluntarily and unnecessarily takes an exposed position on a train, where the risk was so obviously dangerous that a prudent man would not think of incurring it, he is guilty of contributory negligence, and there can be no recovery against the railroad company for the injuries he received.

Appeal from Court of Common Pleas; John J. Dobler, Judge.

Action by the state, to use of Kate M. Miller, widow, and others against the Western Maryland Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MCSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

*Thomas G. Hayes, C. H. Medders, and Harry K. Brooks*, for appellants.

*Benj. A. Richmond and Leon E. Greenbaum*, for appellee.

BRISCOE, J. This suit was instituted on the 10th of August, 1905, in the court of common pleas of Baltimore City, in the name of the state for the use of Kate M. Miller, widow, and William Donald Miller and Rosilla C. Miller, infants, against the Western Maryland Railroad Company, to recover damages for the death of Elmer C. Miller, husband and father of the equitable plaintiffs, whose death is alleged to have been caused by an accident on the railroad of the appellee while the deceased was upon its cars, and being carried from Mt. Hope Station to Thurmont, in the state of Maryland. The facts of the case are few, and the questions for our consideration arise upon the ruling of the court, at the close of the plaintiff's case, in granting the defendant's prayer withdrawing the case from the jury upon the ground that there is no evidence legally sufficient to entitle

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\*For the authorities in this series on the subject of contributory negligence and assumption of risks where a person exposes himself to a known danger, see foot-notes appended to *Holmes v. Chicago, etc., Ry. Co.* (Neb.), 18 R. R. R. 485, 41 Am. & Eng. R. Cas., N. S., 485.

For the authorities in this series on the subjects of assumption of risk and contributory negligence where a railroad employee rides in a dangerous place without necessity, see *Erie R. Co. v. Kane* (C. C. A.), 8 R. R. R. 423, 31 Am. & Eng. R. Cas., N. S., 423; *Howard v. Southern Ry. Co.* (N. Car.), 9 R. R. R. 625, 32 Am. & Eng. R. Cas., N. S., 625; *Lemasters v. Southern Pac. Co.* (Cal.), 20 Am. & Eng. R. Cas., N. S., 296; foot-notes appended to *Coyle v. Pittsburgh, etc., Ry. Co.* (Ind.), 22 Am. & Eng. R. Cas., N. S., 874, note appended to *Chattanooga S. R. Co. v. Myers* (Ga.), 19 Am. & Eng. R. Cas., N. S., 776; *Atchison, etc., R. Co. v. Tindall* (Kan.), 6 Am. & Eng. R. Cas., N. S., 557.

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the equitable plaintiff to recover, and the verdict must be for the defendant. The defendant's second prayer, to the effect that, under the undisputed evidence in the case, the deceased was guilty of negligence directly contributing to his death, was not passed upon by the court, in view of its action on the first. The declaration, in substance, states that on or about the 17th day of June, 1905, Elmer C. Miller, deceased, was a passenger and riding upon a train of cars upon the steam railway of the appellee; that he boarded the train at a station on the railway known as "Mt. Hope Station;" that while a passenger on the train, which was a west-bound freight train, the same came into collision with an east-bound freight train of the appellee, "wrecking and derailling the trains, or portions thereof, by and in consequence of which Miller was killed; that the collision and wreck was caused by the gross negligence, carelessness, and improper management of the appellee company, and that Miller in no wise contributed to the acts or omissions causing his death. The facts of the case, as presented by the record, are these: The deceased was an employee of the appellee and as such was one of what was called a "floating gang" consisting of about 39 laborers whose employment was to lay steel rails and to do such other work as occasion required. The gang was provided with a car, which was called their "camp." They went to their work from the camp in the morning and returned to it in the evening. Under their contract with the appellee, they had free transportation from and to the camp to the place of their work or to their homes. On the 17th of June, the gang of laborers, among whom was the deceased, stopped their work at Mt. Hope and boarded a passenger train of the appellee going west. Miller, was enroute for his home, at Thurmont. Some of the men composing the gang when boarding the train got into the baggage car. The deceased got upon the bumper or platform of the baggage car and there remained until the occurrence of the accident that caused his death.

There was evidence that the train at the time of its arrival at the station was crowded to such an extent that passengers were standing in the aisles of the passenger coaches. Freeburt, the witness, who was in company with Miller, in answer to the question if he had looked into every coach to see if each was crowded testified: "We never go back to the back coaches." He also testified: "Q. Then you went to the baggage car? A. Yes, sir. Q. And Miller went to the baggage car? A. Yes, sir. Q. Where did you go, inside or outside of the baggage car? A. I went inside. Q. Where did Miller go? A. He went outside on the platform. He didn't go inside. Q. He was outside on the platform of the baggage car? A. Yes, sir. Q. Then he was on the platform of the baggage car the last time you saw him? A. Yes, sir; the platform outside of the baggage or mail car." The proof further shows that, a few minutes after the train had started, it collided with a coal train coming east on the main line, causing the death of Miller. There is no evidence



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whatever as to the cause of the collision or as to any negligence on the part of the appellee.

Upon this state of case, it is earnestly contended on behalf of the appellant, that the deceased at the time of the accident was a passenger on the appellee's train, and, the relation between the appellee and the deceased being that of carrier and passenger, the mere proof of the collision and injury to the deceased raises against the appellee the presumption that the accident and injury resulted from negligence. *Trainor's Case*, 33 Md. 542. *Abell's Case*, 63 Md. 441. *Mahone's Case*, 63 Md. 144. It is contended, however, upon the part of the appellee, that under the facts of this case, the deceased was not a passenger, at the time of his injury, but that he was an employee of the company, and this being so, there can be no recovery, for two reasons. (1) Because, if he was an employee, the bare fact that he was injured in a collision, without any proof of the company's negligence causing the collision, raises no presumption in his favor that the collision was caused by the negligence of the company's servants. Being an employee he could not predicate a right to recover upon the bare proof of a collision alone, but the burden was upon him to go further and show affirmatively that the accident was caused by the negligence of the company; and (2) because, if he was an employee, and even if negligence of the company's servants could be presumed in his favor from the bare fact of a collision, it would be the negligence of a fellow servant, which would bar a recovery. We think, however, it is clear, upon the evidence disclosed by the record, that the appellant contributed to his own misfortune, and that the plaintiffs cannot recover in this action. According to the undisputed evidence, the deceased deliberately got upon the bumper or platform of the baggage car, and remained in this exposed position until the collision occurred. The rule is well settled that, if a person voluntarily takes an exposed position upon a train, he himself incurs the special risks of that position. In this case the risk was so obviously dangerous that a prudent man would not think of incurring it. Such conduct, under all the authorities, is *per se* contributory negligence, and bars any recovery by the representatives of the deceased. In *P. & R. I. R. Co. v. Lane*, 83 Ill. 452, it is said: When a person takes such and like hazards, of their own choice, they must bear the injury. Had the deceased acted with ordinary prudence and remained in the passenger car, where it was his duty to have remained, he would not have been killed.

In the case at bar, if the deceased had gone into the passenger or baggage car, and not remained on the bumper or platform, he would not have been killed. He voluntarily selected a place of danger, and remained there until he was killed. *Baltimore R. Co. v. Foreman*, 94 Md. 231, 51 Atl. 83. The deceased was, therefore, guilty of contributory negligence, and there can be no recovery against the railroad company, apart from the other questions in the case. The judgment will be affirmed.

Judgment affirmed.

CROW *v.* NORTHERN PAC. RY. CO.

(Supreme Court of Washington, March 8, 1907.)

[88 Pac. Rep. 1022.]

**Master and Servant—Injuries to Servant—Railroads—Collision—Negligence.\***—Where the rules of defendant railroad company required engineers to sound whistles at such points as that where the collision, in which plaintiff, a brakeman, was injured, occurred, defendant was negligent in permitting the whistle of the engine attached to plaintiff's train to remain out of repair, so that it could not be heard for any distance.

**Same—Contributory Negligence.†**—Where plaintiff, a brakeman, was injured in a railroad collision, resulting from a failure to flag an approaching train as required by the rules, plaintiff having been ordered by his conductor, who was in immediate charge of the train, to proceed on his train, was not negligent in failing to flag, which would have involved a direct conflict with the conductor's orders.

Appeal from Superior Court, Spokane County; Miles Poin-dexter, Judge.

Action by Thomas J. Crow against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*Edward J. Cannon*, for appellant.

*Richardson, Roche & Oustine*, for respondent.

DUNBAR, J. This action was brought by plaintiff to recover damages for personal injuries sustained in a collision at Potlatch Junction, Idaho, July 22, 1905. Plaintiff was at that time rear brakeman upon a freight train, and was injured while proceeding with an engine and three cars on a branch line known as the "Clearwater Branch," over the main line of the Palouse branch of the Northern Pacific Railway. Between a quarter and a half a mile from Potlatch Junction there were situate two switch or service tracks. There is a Y at Potlatch Junction, and it is

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\*For the authorities in this series on the question whether a railroad company is responsible for injuries to servants resulting from violations of rules made for the protection of employees, see foot-notes appended to *Driver's Adm'r v. Southern Ry. Co.* (Va.), 18 R. R. R. 11, 41 Am. & Eng. R. Cas., N. S., 11.

†For the authorities in this series on the subject of contributory negligence and assumption of risk where railroad employees fail to comply with their master's rules and regulations, see foot-notes appended to *Baltimore & O. R. Co. v. Doty* (C. C. A.), 17 R. R. R. 753, 40 Am. & Eng. R. Cas., N. S., 753; foot-notes appended to *Moore v. St. Louis, etc., Ry. Co.* (La.), 16 R. R. R. 370, 39 Am. & Eng. R. Cas., N. S., 370; foot-notes appended to *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232; *Illinois Cent. R. Co. v. Stith's Adm'x* (Ky.), 16 R. R. R. 729, 39 Am. & Eng. R. Cas., N. S., 729.

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customary, if cars are intended for Lewiston, to convey these cars from the Y to this siding further down the main line. Between the Y and the siding, and continuing upon one side of the Y, there is a sharp curve in the road and a high bluff which conceals the main line from the Y. On the date of the accident there were three cars to be conveyed to this siding. The train upon which the plaintiff was employed was proceeding northerly towards Moscow, and upon its arrival at the junction switched out these three cars, and, attaching an engine behind the cars, the train crew proceeded to back the cars down around the bluff towards the siding. The conductor, upon arrival at the junction, examined the train register, and, as the engineer pushed the cars past him, he handed the plaintiff, who was at that time standing upon the ladder of the advance car, the written directions for the disposition of the cars, and gave him the sign to proceed. As the train crew proceeded around the curve, another train upon the main line, proceeding northerly, under orders, upon the same track, rounded the bluff and collided with plaintiff's train, and the collision resulted in the injury to the plaintiff. Contributory negligence was pleaded on the part of the defendant, and the trial resulted in a verdict for the plaintiff in the sum of \$2,000.

It is conceded that there is a rule of the company that all trains must approach terminals, the ends of double tracks, junctions, railroad crossings at grade, and drawbridges prepared to stop, and must not proceed until switches or signals are seen to be right, or the track seen to be clear; that trains doing work at commercial spurs located at other than regular stations must proceed as per rule 299, which provides that, when a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with danger signals a sufficient distance to insure full protection; that, when recalled, he may return to his train, first placing two torpedoes on the rail when the conditions require it; that the front of the train must be protected in the same way, when necessary by the fireman. Another prescribed rule is 307, that in all cases of doubt or uncertainty the safe course must be taken, and no risks run. The respondent admitted that he had been a brakeman and worked upon this branch of the road for several months, and that he was familiar with the rules governing the operation of the cars. But his defense to the allegation of contributory negligence was that he was acting under direct orders from the conductor, who instructed the crew by a signal to proceed without flagging. It is conceded that the whistle was out of repair, and could not be heard any distance, and that the condition of the whistle had been time and again reported to the appellant. It appears clear that the appellant was guilty of negligence in this respect; the evidence showing that the whistle, when it was in its normal condition, could have been heard from two to five miles. It was also shown that the rules of the company required the

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engineers to sound the whistles at such points as the one where the catastrophe occurred; and it is the contention of the respondent that the failure of the appellant to provide a suitable and proper whistle was the proximate cause of respondent's injury.

The principal contention of appellant is that, by reason of the respondent not flagging after the conductor had given the crew the signal to continue going ahead, he was guilty of contributory negligence and that, notwithstanding the order of the conductor, he should have obeyed the printed rules, and, not having done so, he cannot recover for damages which ensued. It must be borne in mind that this is not a case where, in the absence of a superior officer or in the absence of a contrary direction from such superior officer, the servant neglected to obey the rules of the company. But in this case there was a direct command given by the superior officer, the conductor, who was present and engaged in person in moving the cars. It was said by the court in *Atchison, T. & S. F. R. Co. v. Reesman*, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768, that the question was not one of obedience to orders, but of compliance with the rules, and that, generally speaking, the duty of compliance was not waived by the mere fact that some controlling officer has knowledge of the failure to comply. This case is largely relied upon by appellant, but whatever may be said of the reasoning of the case generally it is distinguished from the case at bar in the essential particular above mentioned, that in this case the respondent could not have complied with the order given by his superior. In that case, as showing that the question here was not the question that was decided, it was said by the court: "It is not pretended that the conductor directed the plaintiff to remain on the platform, and not go onto the top of the caboose. A different question may arise in case the violation of the rules of the company is in obedience to a direct command from the immediate superintendent." It must of necessity be one of the most important rules of a railroad company that some one be in control whose orders must be implicitly obeyed. That some one in this case was the conductor, and to permit an inferior officer like a brakeman to question the orders of the conductor or to issue orders in conflict therewith, would be to invite most serious results to both property and life. "If a special order conflicts with a standing rule, and both proceed from the same authoritative source, then the servant will be justified in obeying the special order. The reason is that the mind of the master or his representative may be supposed to have been brought to bear specially upon the subject in giving the special order, and that the order may well be deemed to operate as an exception to the general rule." 5 Thompson, Commentaries on Law of Negligence, p. 45. The conductor having ordered the crew to proceed, and there having been no opportunity under such or-

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der for the brakeman to carry out the printed rules, he was not guilty of contributory negligence.

There being no error committed by the court in giving or refusing to give instructions, or in any other particular, the judgment is affirmed.

HADLEY, C. J., and MOUNT, ROOT, RUDKIN, FULLERTON, and CROW, JJ., concur.

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CHICAGO, R. I. & P. RY. CO. v. RATHNEAU.

(Supreme Court of Illinois, Feb. 21, 1907.)

[80 N. E. Rep. 119.]

**Master and Servant—Fellow Servants—Vice Principals.\***—An employee directing a gang engaged in loading iron rails on a flat car and controlling the manner of performing the work is a vice principal and not a fellow servant, though he has no power to employ or discharge the men.

**Same—Injury to Servant—Assumption of Risk.†**—An employee acting under the direction of a foreman is not required to disobey him, or, by obeying, assume the hazard of obedience, unless the danger to which he is exposed is so imminent that a man of ordinary prudence will not incur the risk.

**Same—Question for Jury.**—Whether an employee acting under the order of a foreman assumed the risk arising from the danger to which he was thereby exposed held, under the evidence, for the jury.

**Trial—Evidence—General Objections—Effect.**—It is only where evidence is inadmissible for any purpose that a general objection thereto is sufficient.

**Same.‡**—Where, in an action for injuries to an employee engaged in loading iron rails on a flat car, in consequence of a stake in the car being too high, and striking a rail, the court did not, as against a

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\*For the authorities in this series showing who are, and are not, vice principals, or superior servants, risks from whose negligence other employees do not assume, under the fellow servant rule, see foot-notes appended to *Mollhoff v. Chicago, etc., R. Co.* (Okla.), 19 R. R. R. 709, 42 Am. & Eng. R. Cas., N. S., 709; *Jemming v. Great Northern Ry. Co.* (Minn.), 19 R. R. R. 697, 42 Am. & Eng. R. Cas., N. S., 697; *Shuster v. Philadelphia, etc., R. Co.* (Del.), 19 R. R. R. 6, 42 Am. & Eng. R. Cas., N. S., 6; *Chicago Union Traction Co. v. Sawusch* (Ill.), 18 R. R. R. 856, 41 Am. & Eng. R. Cas., N. S., 856; foot-notes appended to *Howard v. Chesapeake & O. Ry. Co.* (Ky.), 18 R. R. R. 842, 41 Am. & Eng. R. Cas., N. S., 842.

†See foot-notes appended to *North Chicago St. R. Co. v. Aufmann* (Ill.), 20 R. R. R. 421, 43 Am. & Eng. R. Cas., N. S., 421; foot-notes appended to *Ives v. Wisconsin Cent. R. Co.* (Wis.), 20 R. R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393; foot-notes appended to *Drake v. San Antonio & A. P. Ry. Co.* (Tex.), 20 R. R. R. 157, 43 Am. & Eng. R. Cas., N. S., 157.

‡See generally, extensive note, 19 R. R. R. 320, 42 Am. & Eng. R. Cas., N. S., 320.

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general objection, err in allowing a witness to state that, during the time he had worked for the employer, he had never known of a stake being high enough to strike a rail before.

**Same—Instructions—Abstract Propositions of Law.**—The giving of an instruction stating an abstract proposition of law is not error where the instruction contains an accurate statement of the law and is not misleading, though instructions should be based on the evidence.

**Master and Servant—Injury to Servant—Negligence—Instructions.**—Where, in an action for injuries to an employee engaged in loading iron rails on a flat car, it appeared that a co-employee, acting as vice principal, placed a stake, causing the injury, in position, and directed the men how to do the work, an instruction that, where a master confers authority on an employee to control workmen in carrying on a particular work, the employee, in directing the movements of the men, is a vice principal, and his negligence is the negligence of the master, was not erroneous, for it could have been applied only to the co-employee's act in directing the men when he was a vice principal and not to his act in placing the stake when he was a fellow servant.

Appeal from Appellate Court, First District.

Action by Joseph Rathneau against the Chicago, Rock Island & Pacific Railway Company. There was a judgment of the Appellate Court affirming a judgment for plaintiff, and defendant appeals. Affirmed.

*Benjamin S. Cable*, for appellant.

*James C. McShane*, for appellee.

VICKERS, J. This was an action on the case begun in the superior court of Cook county. The declaration consisted of one count, in which it was averred, in substance, that the plaintiff, April 18, 1902, was employed by the defendant as a laborer to work with a certain gang engaged in loading iron rails on a flat car at Blue Island; that the defendant had a foreman in charge of plaintiff and said other laborers engaged as aforesaid, whose orders it was their duty to obey, and who was not plaintiff's fellow servant, but was a vice principal of the defendant; that plaintiff and his co-laborers, by the direction of said foreman, placed two long iron rails with one end of each on the flat car and the other end thereof on the ground, said rails to be used as skids in skidding rails from the ground onto the car and loading the car; that after said rails to be so used were placed, said foreman negligently so placed a stake in the side and at one end of said car so high that it would strike and tip the rails while being skidded from the ground onto the car, thereby rendering the work extraordinarily dangerous; that, while said stake was so placed said foreman negligently ordered plaintiff and his co-laborers to skid said rails onto the car, and while, in obedience to said order, they were skidding a rail from the ground onto the car, and while plaintiff was ex-



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exercising ordinary care for his safety, one end of the said rail came in contact with the stake, and the rail was turned over, slid down the skid, and caught and crushed so severely the plaintiff's ankles that they have become and are permanently crippled and their usefulness is permanently impaired, etc. The appellant company filed a plea of not guilty. Upon a hearing the jury found the issues for the appellee. A motion for a new trial was overruled, and judgment in the sum of \$12,500 was entered on the verdict. An appeal was prosecuted to the Appellate Court for the First District, where the judgment was affirmed, and the record is before us by a further appeal prosecuted by the appellant.

At the close of all the evidence the appellant company filed a motion for a peremptory instruction to take the case from the jury, which was overruled, and it is here urged the court erred in such ruling. It is insisted by the appellant company that, if the appellee "was injured by the act of some other person or by the negligence of any one than himself, this other person was either O'Rourke or some other member of the gang, and in either event a fellow servant."

The injury occurred on the 18th day of April, 1902. The appellee, at the time of the injury, had only been in the employ of the appellant company for nine days. The evidence shows that on the first eight days of his employment he was engaged in other work. On the day of the injury appellee was directed to help in loading rails upon a flat car, and he had never been engaged in such work before that time. The car onto which the rails were being located stood north and south. The rails were old ones which had been taken up from the track and weighed from nine to eleven pound per foot, some of them being thirty feet long and others shorter, and they were piled on the ground a short distance west of the car and were loaded onto the car from its west side. There were two long, perpendicular stakes driven into holes or pockets on the east side of the car to keep the rails in when loaded onto it from the west side, and there were two men on the car to receive and pile the rails when they came onto the car. Two greased rails were placed about seven feet apart about the middle part of the west side of the car, their upper ends resting on the side of the car or on rails at that side, and their lower ends on the ground a short distance from the pile of rails to be loaded. These rails were used as skids on which to shove the rails onto the car. The farther or east side of the car was first loaded to the required height, the loading gradually approaching the west side of the car, and when the loading reached to within a short distance from the west side of the car it became necessary to drive two short stakes into the pockets on the west side of the car to prevent the rail or rails then placed under the upper ends of the skids from being crowded off the car by the rails already loaded. The flat part of the rail, when being shoved up, was next to the skids. The rails were shoved up by the men by means of

round sticks about one and three-quarters inches in diameter, with a block end. There was danger that if a rail being shoved up should come in contact with anything and turn over, the men shoving it would lose their hold on it by their sticks being thrown out of place and it would slide down the skids. The man alleged to have been in charge of the gang of workmen was Peter O'Rourke, and the evidence not only tends to show, but does show, that O'Rourke was directing the men in the work and gave orders as to the means to be adopted in performing the same. The two stakes above referred to were put in by O'Rourke. The evidence clearly shows that the stake at the south end of the car was higher than the skids upon which the rails were being raised and put on the car. The proof shows that the attention of O'Rourke was called to the fact that the stake extended above the skids, and when his attention was so called he made no effort to drive the stake further into the slot on the side of the car or to chop or saw off the stake, but called to the gang on the ground to proceed with the work of pushing the rails up. The men obeyed the direction, and the evidence tends to show that when the rail reached the top of the skids it caught or hit on the stake, causing the rail to turn, whereby the gang pushing the rail lost control of it, and it slid back down the skids, and caught the appellee, and injured him.

The evidence, we think, tends strongly to show that O'Rourke was the foreman in charge of the gang, and the giving of the order to push the rails up caused the injury to appellee, and that he gave the order to the men to push up the rail when he knew the stake was too high. The witnesses, when speaking of O'Rourke, called him the "foreman" or "boss." The evidence of O'Rourke himself shows that he was directing the men, for he testified that he kept telling the men "to be careful." It was shown O'Rourke's attention was called to the fact that the stake was too high, and that, instead of attempting to lower it, he directed the men to proceed to load the rail. O'Rourke testified he knew the stake was too high, but that he had no ax or saw with which to reduce its height, and that he used the shortest stake he had there. It was not necessary for appellee to show, in order to prove O'Rourke was a vice principal, that O'Rourke had the power and authority to employ and discharge the men under him. "The mere fact that he [the foreman] had no power to employ or discharge men does not necessarily render him other than a vice principal. The question was one of fact for the jury." *Fraser & Chalmers v. Schroeder*, 163 Ill. 459, 45 N. E. 288. The question whether or not O'Rourke was a vice principal was a question of fact to be determined by the jury, and, there being evidence fairly tending to support the position of the appellee that he was acting as a vice principal in directing the men and controlling the manner of performing the work in which they were engaged, the court properly refused to give the peremptory instruction.

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It is insisted that the danger arising from the stake being too high was as open and plain to appellee as to O'Rourke, and that appellee must have known that, the stake being too high, a rail would turn or be thrown over when shoved up against the stake, and was, therefore, dangerous. We cannot assent to this. The appellee was working on the ground with a gang of men and had only worked there that one day. O'Rourke had been in the employ of the appellant company for 20 years. He was, at the time of the injury to appellee, on the top of the car, near the stake which he knew to be too high. His attention had been called by another man on top of the car to the condition of the stake, but he ordered the men to proceed with the work of pushing up the rail. The attention of the men pushing the rail must have been attracted to their own part of the work, and they were merely obeying the order of the foreman at that time. As the appellee was acting under the direction of the foreman he was not required by law to disobey him, or, by obeying, assume the hazard of obedience, unless the danger to which he was exposed was so imminent that a man of ordinary prudence would not have incurred the risk. *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Graver Tank Works v. O'Donnell*, 191 Ill. 236, 60 N. E. 831. The trial judge very properly allowed this question to go to the jury for determination.

It is insisted the court erred in failing to sustain an objection to the question asked of appellee's witness Mislich, as follows: "During the time you worked there did you ever know a stake being high enough to strike the rail before?" To which the witness answered, "No." It is urged such evidence was in no way material or proper; that the question was as to what was done on the day of the injury. The objection offered to this question was general. We have held that it is only when the evidence is inadmissible for any purpose that a general objection will suffice. *Illinois Central Railroad Co. v. Wade*, 206 Ill. 523, 69 N. E. 565. In such state of the record we do not think it can be urged the court erred in admitting such evidence. It has often been held by us that proof of the usual manner of conducting a business is proper evidence in suits of this character as shedding light upon the acts and conduct of the parties. *St. Louis Nat. Stock Yards v. Godfrey*, 198 Ill. 288, 65 N. E. 90.

Counsel for appellant urges at great length that error was committed by the court in giving the only instruction asked on behalf of appellee, which is as follows: "The court instructs the jury that, where a master confers authority upon one of his employees to take charge and control of a certain class of workmen in carrying on some particular branch of his business, such employee, in governing and directing the movements of the men under his charge, with respect to that branch of the business is the direct representative of the master, and is not a mere fellow servant, and all of the commands given by him

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within the scope of his authority are, in law, the commands of the master, and, if he is guilty of a negligent and unskilled exercise of his power and authority over the men under his charge, it is, in law, the same as though the master itself was guilty of such conduct." The objection to the instruction, as stated by counsel, is "that, if the appellee was injured by the act of some other person or by the negligence of any other than himself, this other person was either O'Rourke or some other member of the gang, and in either case a fellow servant; that this theory of the defense was entirely ignored in the one instruction offered by the appellee, which seems to assume or take it for granted, first, that O'Rourke was a vice principal; and second, that it was the exercise of his power as such vice principal in giving an order to the gang that caused the accident." The rule of law embraced in this instruction was deduced from a careful examination of the authorities and announced with his usual clearness and force by Justice Mulkey in *Chicago & Alton Railroad Co. v. May*, 108 Ill. 288. The authority and reason of the May Case have never been questioned in this state so far as we are aware, but, on the contrary, the case has been often cited, approved, and followed. *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57, 24 N. E. 627; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, 38 N. E. 946; *Fraser & Chalmers v. Schroeder*, *supra*. This instruction, as drawn, is a mere abstract proposition of law, and might, for that reason, have been refused without error. The doctrine of this court is that instructions should be based on the evidence before the jury. *Coughlin v. People*, 18 Ill. 266, 68 Am. Dec. 541; *Belk v. People*, 125 Ill. 584, 17 N. E. 744; *Healy v. People*, 163 Ill. 372, 45 N. E. 230. The giving of such an instruction, if it contains an accurate statement of the law and is not misleading, is not error. *Beidler v. King*, 209 Ill. 302, 70 N. E. 763, 101 Am. St. Rep. 246.

The case of *Baier v. Selke*, 211 Ill. 512, 71 N. E. 1074, 105 Am. St. Rep. 208, is relied on by appellant in support of its objection to this instruction. In that case the foreman, Weber, ordered the employee to get into a rice tub and clean it. Afterwards, and while this order was being executed, Weber threw in a clutch and started the machinery going, which rendered Selke's position perilous and resulted in his being injured. The fifth instruction in the Selke's Case directed the jury to find the defendant guilty if they believed the plaintiff was injured, as charged in his declaration and while exercising reasonable care for his own safety, through the negligence of the foreman. The instruction was held erroneous because it did not distinguish between the act of the foreman in giving the order to Selke to go into the rice tub and clean it, an act which he did in his capacity as vice principal, and for which the master was liable, and the act of Weber in throwing in a clutch, an act which he did, not as foreman, but as a co-laborer and fellow servant, and for any negligence in respect to which the master would not be responsible. The case is not in conflict with the May Case,

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*supra*, and others in the line of cases based on the May Case. On the contrary, the May Case is cited and approved in the Selke Case on the point that a person may be a vice principal as to one thing and a fellow servant as to another, depending on the nature and character of the particular act.

In the case at bar it is sought to apply this rule to the two acts of O'Rourke—placing the stake in the socket, as to which it is said he was a fellow servant, and the order to shove the rails up, as to which he is clearly a vice principal. A careful reading of the instruction under consideration will show that it could not possibly have been applied by the jury to any act of O'Rourke except the order to appellee and his fellow workmen to shove up the rails. It is unlike the instruction condemned by the court in *Baier v. Selke, supra*. While, by his declaration appellee has charged that O'Rourke negligently placed the stake in the side of the car so high that the rails would not pass over it and that he negligently gave the order to skid the rails onto the car, still it is not essential to the right of recovery that both of these acts should be shown to be actionable negligence in appellant. If O'Rourke placed the stake in position, he had notice of its location, its extension above the rails, and must have known of the danger attending the execution of his order. The case would not be any different if any of the other employees had placed the stake if O'Rourke had notice of it. The stake is a mere fact, the existence of which tended to prove the negligence in giving the order. The instruction complained of is an accurate expression of the rule of law, and we are unable to see how it could possibly have misled the jury, and there was, therefore, no error in giving it.

There being no error in this record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

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PENN REFINING COMPANY, Limited, Plff. in Err., v. WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY and Samuel G. De Coursey, Receiver thereof, Western New York & Pennsylvania Railway Company, and Lehigh Valley Railroad Company.

(Argued October 18, 21, 1907. Decided January 27, 1908.)

[28 Sup. Ct. Rep. 268.]

**Carriers—Discriminating Rates.**—Carriers cannot be charged with discriminating against shippers of oil in barrels from the Pennsylvania oil fields to Perth Amboy, New Jersey, because they charge for the barrel package without making a corresponding charge upon shipments in tank cars owned by those shippers who can afford to build and furnish them, the carriers having none of their own, where the transportation by tank cars is more remunerative to the carriers than



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the transportation by barrels, and the barrel shippers have made no demand for tank cars, and cannot use them economically for shipments to Perth Amboy, on account of the lack of facilities for unloading at that point.

**Connecting Carriers—Discriminating Rates.**—A connecting carrier which takes the cars as they are delivered to it by the initial carrier is not liable for a discrimination in favor of shippers of oil in tank cars and against shippers of oil in barrels which may be practised by the initial carrier, merely because such connecting carrier has participated in the adoption of a joint through rate for barrel shipments which is, in itself, reasonable, although, by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 8, a carrier which “shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful,” shall be liable to the full amount of the damages sustained by one injured thereby.

In error to the United States Circuit Court of Appeals for the Third Circuit to review a judgment reversing a judgment of the Circuit Court for the Western District of Pennsylvania, in favor of plaintiff, in an action against interstate carriers to recover the amount of money reparation directed by the Interstate Commerce Commission. Affirmed.

See same case below, 70 C. C. A. 23, 137 Fed. 343.

Statement by MR. JUSTICE PECKHAM:

The plaintiff in error, who was plaintiff below, seeks to review a judgment of the circuit court of appeals for the third circuit (70 C. C. A. 23, 137 Fed. 343), reversing absolutely and without allowing a writ of *venire facias de novo*, the judgment of the circuit court of the United States for the western district of Pennsylvania in favor of the plaintiff company for \$8,579, with interest from May 15, 1894; in all, \$12,706.92. This sum was made up of the charge of 14 cents for the weight of the barrel in which oil was transported to Perth Amboy from the Pennsylvania oil fields, from September 3, 1888, the time when such charge commenced, to May 15, 1894, the time when the hearing on the claims was had before the Interstate Commerce Commission.

The proceeding resulting in the petition herein to the circuit court was originally commenced before the Interstate Commerce Commission, and thereafter conducted pursuant to §§ 13 to 16 of the act creating the Commission (24 Stat. at L. 379, 384, chap. 104), as amended by the act of 1889 (25 Stat. at L. 855, 859, chap. 382, U. S. Comp. Stat. 1901, p. 3165), to obtain relief from certain alleged illegal practices of the railroad companies in the way of overcharges for the transportation of oil for the complainants in the petition, and to obtain reparation therefor.

Three substantially contemporaneous, yet also separate, petitions, were filed with the Commission, two on the 4th of December, 1888, and one on the 30th of January, 1889, by the Independent Refiners' Association of Titusville, Pennsylvania,



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and the Independent Refiners' Association of Oil City, Pennsylvania, against several railroad companies. The petitioners were associations of some sixteen separate refining companies, operating distinct and separate works in the oil regions of Pennsylvania, near the city of Titusville or Oil City.

The petitions were filed for the purpose of obtaining relief from certain charges made by the defendant companies against the petitioners for the transportation of their oil from those oil fields to tidewater in New Jersey, and specially to Perth Amboy, in that state, and described as a point in New York harbor, and also to Boston and points in that vicinity. Their petition relating to the charges for transportation to Perth Amboy is alone involved here.

The ground of complaint in that petition was that the railroads who were therein made defendants, viz., the Western New York & Pennsylvania and the Lehigh Valley, charged 66 cents per barrel of oil, which was alleged to be an excessive, unjust, and unreasonably high rate for the transportation of oil to Perth Amboy.

There was no complaint in the petition of the failure of defendants to furnish tank cars for the petitioners for the transportation of their oil to Perth Amboy. There was no averment of unfairness of the rates as between barrel and tank oil. Nor was there any averment that the defendants, by their custom of charging for the gross weight of the oil and barrels, were giving a preferential rate to the tank shippers as against the barrel shipments made by plaintiffs. It was only alleged that the rate for the transportation of oil to Perth Amboy was unreasonably high at 66 cents per barrel, the weight of the barrel being included and charged for therein. The averments in the petition, that plaintiffs were subjected to undue prejudice and that an undue advantage was given their competitors in business, among others the Standard Oil Trust, had no relation to discrimination arising from a charge for the weight of the barrel, but was connected with the averment that the charge of 66 cents for the carriage of the oil was excessive, and hence worked a disadvantage to the plaintiffs and gave an unreasonable preference to the competitors in plaintiffs' business.

The prayer of the petition was that the Commission direct the defendants to cease their unlawful acts, etc.

The evidence was taken before the Commission in the three cases, with the understanding it should be applied to each or all the cases, so far as applicable therein.

It appears by the evidence before the Commission that the charge of 14 cents per barrel (in addition to 52 cents for its contents) for the transportation thereof to Perth Amboy commenced about September, 1888, and prior to that the charge had been 52 cents for the oil and the barrel. There had been some reasons alleged on account of which the charge had been limited to the total of 52 cents before September, 1888. Perth Amboy was the station to which all the petitioners in the proceedings before the

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Commission, applicable to that port, had consigned their oil for export, and that station had no conveniences for unloading in bulk the oil which was brought there in tank cars. Not one car in a hundred was a tank car. The trade demand at that point was for oil in barrels, and the ocean shipments therefrom by the petitioners were also made in barrels, as there were no vessels from that port carrying oil in bulk. Some of the petitioners in the proceedings before the Commission owned tank cars, but did not use them for the Perth Amboy port for the above reasons. Oil which came to Perth Amboy, intended for export, if it arrived in tank cars, had to be there unloaded and filled in barrels before it could be loaded on ships. The petitioners, including the plaintiffs, therefore, had no use for tank cars to that point. The Lehigh Valley road did not own tank cars, nor did any of the other railroad companies to any material extent, except the Pennsylvania Railroad, which is not a party to this proceeding. The charges for transportation of oil in tank cars did not include any charge except for the oil. In the transportation of the oil to Perth Amboy via Buffalo the initial carrier was the Western New York & Pennsylvania Railroad Company, the Lehigh Valley Railroad Company taking the oil as delivered to them in barrels in cars at Buffalo, New York, and transporting it to Perth Amboy, the plaintiffs paying therefor a joint through rate, amounting to 66 cents per barrel, including the barrel. The defendants had established this joint through rate. The tank cars that were used by others for the transportation to other places than Perth Amboy were rented from the owners, who were also shippers of the oil, to the railroad companies, who paid the owners for the use of such tank cars a certain sum, determined by the miles run. Those cars were used exclusively for the transportation of the oil of the owners of the cars.

The Commission ordered the defendants to cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of western Pennsylvania to New York and New York harbor points, or, on reasonable notice, promptly furnish tank cars to complainants and others who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor points as the shipper may direct; and that said defendants notify the public accordingly by publication in their tariff of rates and charges, pursuant to the provisions of § 6 of the act to regulate commerce. It was also ordered that the rate on shipments of oil, both in tanks and in barrels, over said roads, should be the same, and the said rate from said oil regions to New York points should not exceed 16½ cents per hundred pounds. The defendants were also required "to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package, on shipments of oil in barrels, when the use of tank cars

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had not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use."

In its opinion, covering, so far as applicable, the three cases, the Commission said that the unlawful discrimination regarding the charge of 14 cents for the barrel package, in addition to the 52 cents for the carriage of the oil per barrel, as against 52 cents per barrel, by tank cars, without any charge for the package, lay in the fact that the choice was not open generally to shippers, and that the case was one where both modes of transportation are employed by the carrier, and the use of one, the tank cars, is not open to shippers impartially, but is practically limited to one class of shippers, and that the charge for the barrel package in barrel shipments, in the absence of a corresponding charge on tank shipments, resulted in a greater cost of transportation to the shipper in barrels on like quantities of oil, between like points of shipment and destination, than to the tank shipper, and that it was an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage, and giving the tank shipper an undue advantage, and that no circumstances and conditions had been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers.

The order of the Commission was filed November 14, 1892, and the proceedings were kept open for the purpose of ascertaining the amounts which were due the parties plaintiff on the theory adopted by the Commission.

The defendants did not comply with the order, but continued to charge the 14 cents for the barrel, and the parties seeking reparation—that is, the recovery of the damage which they alleged they had sustained—applied for a hearing before the Commission to ascertain the amount thereof. The Commission proceeded thereafter, on proper notice, to determine the amounts due each of the claimants from September 3, 1888, the time of the commencement of the charge for the barrel transportation, to May 15, 1894, the time of the hearing before the Commission, and found (October 22, 1895) the amount due the plaintiff, the Penn Refining Company, Limited (among many other claimants), to be the amount already stated, arising, as found, from the transportation of barrels containing petroleum oil, shipped and carried by the railroads from Oil City and Titusville to Perth Amboy at 14 cents per barrel in addition to 52 cents for its contents.

The Commission, in its reparation opinion, stated that the carriers had failed to notify the public, by publication in their tariffs of rates and charges, that they would, on reasonable notice, supply shippers who might apply therefor with tank cars for transportation to New York harbor points. The original order, directing the publication of these notices by defendants in their tariffs of rates, was entered November 14, 1892, while the period covered by the reparation order of October, 1895, giving damages, included four years, namely, from September, 1888, to

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November, 1892, before the making of such order. The Commission, in its opinion, also stated that tank cars had not been open to the use of shippers generally on the carriers' roads, but there was no statement or finding that plaintiffs had ever applied for such cars or desired them, or had been refused. The companies did not comply with the order of reparation, and the Commission then commenced (some time in 1896) a proceeding in its own name in the circuit court of the United States, in equity, to enforce all the directions contained in the orders, including the provisions for the payment of the money damages found due the various claimants. Upon demurrer that court held that the latter provision could not be enforced in equity, as the railroads were entitled to a jury trial on the issue as to the amount of the money recovery, and that the order in regard to the amount due ought to be enforced by each plaintiff in his own name. *Interstate Commerce Commission v. Western New York & P. R. Co.*, 82 Fed. 192-195.

Thereupon, and in April, 1901, this proceeding by petition was commenced in the United States circuit court for the western district of Pennsylvania by the Penn Refining Company, Limited, to recover the amount of the money reparation directed by the Commission. The Lehigh Valley Company demurred to the petition, which was overruled, and issue was then joined by all the defendants upon the material allegations of the petition, and the case was tried in March, 1902, and a verdict found for the plaintiff against all the defendants.

*Messrs. James W. Lee, Samuel S. Mehard, M. J. Heyward, and Eugene Mackey*, for plaintiff in error.

*Messrs. John G. Johnson, Francis I. Gowen, and Patterson, Sterrett, & Acheson*, for defendants in error.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the court:

The questions arising on this writ of error are, in some respects, different in regard to the different railroads who are defendants in error, but, as to the matters now to be discussed, all occupy the same position.

In their petition to the Commission, the petitioners in that proceeding complained of the rate of transportation of oil to Perth Amboy, fixed by the carriers at 66 cents per barrel, the weight of the barrel being included and charged for in that amount, which rate, it was asserted, was unreasonable and excessive.

In the opinion of the Commission, filed with its order, in referring to a former charge of 52 cents per barrel of oil without charging for the weight of the barrel, from the oil fields to Perth Amboy, it is said: "While this rate is fully as high as it should be in view of the nature of the traffic and the conditions surrounding it, and might possibly be made less without depriving the carriers of a fair remuneration for their service, we do not feel authorized, under all the facts and circumstances disclosed

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by the record and evidence in these cases, to order a reduction in addition to the exclusion of the charge for the barrel package" (14 cents); "and our conclusion is that the rate to New York points should be not more than 16½ cents per hundred pounds, both in tank and barrel shipments, to be charged, in both cases, only for the weight or quantity of oil carried, exclusive of any charge for the package." Again, the Commission, in its opinion, said: "In order to guard against misapprehension the Commission wishes to say that these cases are decided purely upon the facts as set forth in the situation as delineated in the record and by the evidence. It is not intended to hold, nor should this report be construed to hold, that, aside from other controlling circumstances, the carrier, in hauling packages, is not entitled to pay according to the weight thereof. It is simply held that, on account of the peculiar circumstances in these cases, to charge for the weight of the barrel places barrel shippers at a disadvantage as against tank shippers, and the practice in these cases, while the circumstances and conditions remain unchanged, should be condemned." Upon referring to the order actually made by the Commission, its language is "that the action of the defendants in charging for the weight of barrels on shipments of refined oil in barrels over the several through lines formed by their respective railroads from Titusville, Oil City, and other points in the oil regions of western Pennsylvania, to New York and other points in New York harbor, or to Boston and points called and known as Boston points, works unjust discrimination against the shipper of such oil in barrels in favor of shippers of the same commodity in tank cars, while said defendants refuse or neglect to furnish tank cars to complainants and other shippers for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; that rates per hundred pounds on shipments of oil in tanks or in barrels should be the same, and from said points in the oil regions of western Pennsylvania to New York harbor and Boston points such rates should not exceed 16½ cents and 23½ cents respectively, and that defendants should make reparation to complainants and others in all cases where charges on shipments in barrels between those points have included a charge for the weight of the barrel, and tank cars have not been open impartially to shippers of refined petroleum oil over their lines."

The defendants were also, by the order of the Commission, "required to wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipment of oil in barrels over their respective roads or lines from the oil regions of western Pennsylvania to New York and New York harbor points, or to Boston and Boston points, or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct, and that on or



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before the 9th of January, 1893, said defendants notify the public accordingly, by publication in their tariffs of rates and charges, pursuant to the provisions of § 6 of the act to regulate commerce, and also file copies of said tariffs with this Commission, as required by the provisions of said section; and defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within sixty days," etc., as set forth in the order.

By reference to the foregoing extract from the opinion of the Commission it appears that they did not hold that the carrier, in hauling barrels of oil, was not entitled to pay for the weight thereof, including the package, but only that the particular circumstances of the case before it made it improper to charge for the weight of the barrel, because, by such charge, the shippers of oil in barrels were placed at a disadvantage as against shippers by tank cars, and although in one portion of the opinion it is stated that the charge of 52 cents per barrel, excluding the weight of the barrel package, was as high as it should be in view of the nature of the traffic and the conditions surrounding it, nevertheless the Commission gave the above-quoted precise directions contained in its formal order. It made use of language by which the defendants were required to cease from charging for the transportation of the barrel package, or, on reasonable notice promptly furnish tank cars to complainant and other shippers who might apply therefor for the purpose of loading and shipping oil to New York harbor or Boston points, as the shippers might direct. This, of course, amounted and was equivalent to a holding that the charge for the weight of the barrel package of oil was not excessive. If the charge for the carriage of the barrel itself, taken in connection with the charge for the weight of the oil contained therein, made a total charge which was, in and of itself, excessive or unreasonably high (as was the complaint of the petitioners), of course the Commission would not have permitted the charge, even if the petitioners had not applied for the use of tank cars. *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 23, 45 L. ed. 719, 727, 21 Sup. Ct. Rep. 516; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 190 U. S. 273, 283, 47 L. ed. 1047, 1055, 23 Sup. Ct. Rep. 687. This limits the case against the defendants, upon the finding of the Commission, to that discrimination, which was decided to exist under the peculiar circumstances of the case, by reason of the charge for the barrel in which the oil was contained, while in tank cars the charge was limited to the oil carried.

We will therefore inquire what were the peculiar circumstances, as shown by the evidence, which led the Commission to make its order as to discrimination?

They were these:

1. That the railroads owned no tank cars.
2. That they transported oil in tank cars only for those shippers of oil who owned and furnished such cars. That, in the case



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of oil intended for export by such owners, it was sent to ports in New York harbor near Perth Amboy; the seaboard, and not Perth Amboy alone, being the place of competition between the plaintiffs and the Standard Oil Trust and others.

3. That the carrier hired tank cars from the shippers of the oil and paid for them a certain sum, measured by the miles run to and from the place of consignment.

4. That the tank cars, thus hired, were used exclusively to carry the oil of the owners of such cars. Other shippers of oil had their oil carried in barrels, in box cars, and a charge was made for the weight of the barrel containing the oil, while the charge for the oil in tank cars was limited to the amount of oil actually carried.

These facts, in the opinion of the Commission, rendered the case an exception to the usual rule as to the right to charge for the weight of package as well as its contents. In the view of the Commission, although it admitted that the transportation in tank cars was more profitable to the carrier in yielding a larger revenue above the cost of service than that in barrels, yet the case was not presented "of two modes of transportation open indiscriminately to shippers in general, the one at a higher rate than the other, and as to which the shipper may take his choice and pay accordingly, but a case where the cheaper rated and, as claimed by the defendants, the better, mode of transportation, was open practically to only a particular class of shippers." When, therefore, as was stated, "the carrier accepts tank cars owned by shippers who can afford to build and furnish them, and has none of his own to furnish to other shippers, but can supply only box cars, in which barrels must be used for oil, the carrier is bound to see that he gives no preference in rates to the tank shipper, and that he subjects the barrel shipper to no disadvantage."

These facts also appeared before the circuit court, and that court left it to the jury to find from them whether there was "undue discrimination" in favor of the shipper by tank cars and against the shipper by barrels, although the petition made no such allegation, but only alleged that the rates and charges for the service (66 cents per barrel) were excessive, unjust, and unreasonable. Discrimination was not alleged between the tank and the barrel car, for what would seem to be the obvious reason that the plaintiffs could make no use of the tank cars, as they had no facilities for unloading them at Perth Amboy, and no vessels to export the oil in bulk, and the trade demand there was for oil in barrels. But, although, without such facilities, and not being in position, therefore, to use such cars, the plaintiffs nevertheless demanded that no charge for transportation should be made for the barrel package, although the charge made was a reasonable one, unless a charge for the tank packages was made against those who used tank cars for the carriage of their oil to points adjacent to Perth Amboy, and although the transportation by tank cars was more remunerative to the companies than the transportation by barrels.

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The whole theory of this discrimination rests upon the alleged failure to furnish tank cars to shippers demanding them, while at the same time the defendants leased tank cars from their owners and used them to carry the oil of such owners exclusively, and yet in this case there has been no such failure, because there has been no demand for such cars by the plaintiffs, who, for the reasons stated, had no use for them.

Although, in the opinion of the Commission in the reparation proceeding, it was stated that the defendants had not notified the public as to supplying shippers with tank cars, as required by the order of November 14, 1892, while at the same time they denied to plaintiffs the use of such cars, yet there is no statement or finding that the plaintiffs had ever asked for such cars for the Perth Amboy station, and the proof is they did not want them for that point. In the course of the opinion some general observations were made in regard to the failure to supply tank cars, and the consequent necessity for the shippers to ship their oil in barrels and pay transportation on the total weight of the oil and the barrels. The opinion was delivered in two different proceedings, in which all the facts were not identical, one regarding Perth Amboy and the other Boston and adjacent points, and we cannot suppose that the Commission meant to include Perth Amboy in the opinion on this point, because the facts already adverted to furnish ample reasons for not demanding or using tank cars.

It is, therefore, apparent that the failure of plaintiffs to use tank cars during substantially all the period covered by the reparation order was not owing to a refusal or omission of the defendants to supply them on demand, but because they, the plaintiffs, did not demand and could not use them economically for the transportation of oil to Perth Amboy. The opinion of the Commission must be read with reference to this evidence, which, although given on the trial before the court, states the facts existing at Perth Amboy during the time of investigation by the Commission.

If it be assumed that it was the duty of the railroads to furnish tank cars to those who demanded them while the railroads continued to hire that kind of car from owners in which to carry their oil, yet the failure to furnish them to a party that did not desire and had not demanded them certainly ought not to render it necessary for the railroads to carry the barrel package free because no charge was made for the tank package. The Commission said it may be conceded that the amount of paying freight was materially greater in tank than in barrel shipments, and that the tank car, after adding the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with its full load of oil barrels. Nevertheless, it was stated that the facts already adverted to make out a case of unjust discrimination between the tank and barrel shipper, and it was so adjudged in this case, where a shipper did not use or demand a tank car.

We are unable to concur in this view. Because circumstances existed which prevented the economical use of the tank car by plaintiffs (no demand being made for the use of a tank car) is no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one) while none is made for the tank containing the oil. It might be different if plaintiffs desired tank cars and defendants failed to furnish them on demand.

If the carrier must take off such charge for the weight of the barrel, although tank cars are not demanded, the result is to make the defendants carry the barrels free from freight charges, while the shippers were unable to use, and did not demand, tank cars.

It is incumbent, therefore, upon this court to now decide what would be the duty of the carrier as to furnishing tank cars to those who desired and demanded, but did not own, them, where the railroads accepted tank cars owned by other shippers of oil, for the purpose of carrying their oil alone, and to different points than Perth Amboy. We are dealing with a case where such question does not arise.

There are other reasons in addition to the foregoing why the Lehigh Valley should not be held for any discrimination in this case. That company was but a connecting carrier, and took the cars as they were delivered to it by the initial carrier at Buffalo for transportation to Perth Amboy. It was the duty of the connecting carrier to do so, and it was not rendered liable for any alleged wrongful act of the initial carrier merely because of the adoption of a joint through rate from Titusville or Oil City to Perth Amboy, which was in itself reasonable. Nor did the 8th section of the commerce act render it liable for any such alleged wrongful act asserted against the initial carrier.

These views render it unnecessary to consider the objection to the recovery, taken by the defendants in error, based upon the fact that the petition to the Commission asked for relief on the ground that the charges were unreasonably high, while the relief granted was based upon discrimination,—a charge not contained in the pleading. For the reasons already stated, the judgment of the Circuit Court of Appeals is affirmed.

Mr. Justice MOODY, dissenting:

In my opinion there was evidence which tends to support the plaintiff's cause of action, and I think that it should have been, as it was, submitted to the jury. It appeared that the plaintiff was engaged in shipping oil, destined for export, from the oil regions in Pennsylvania to Perth Amboy. Up to September, 1888, the transportation rate was 52 cents per barrel, and that rate applied, whether the oil was carried in barrels or in tank cars. At that rate the plaintiff was able to ship oil in competition with other producers. In September, 1888, the rate for shipment in barrels was changed to 66 cents per barrel, while the rate was left unchanged where the oil was carried in tank cars. The evidence tended to show that, in view of the number,

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ownership, and management of all the tank cars in existence, the new rate was practically prohibitory of barrel shipments from the Pennsylvania oil regions to the seaboard, that it was designed by a competitor, who influenced the defendants to impose it, to have this effect, and that this was the only method of shipment practically open to the plaintiff. Under these circumstances the plaintiff joined with others in a complaint to the Interstate Commerce Commission. Section 3 of the interstate commerce act makes it "unlawful \* \* \* to subject \* \* \* any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" [24 Stat. at L. 380, chap. 104, U. S. Com. Stat. 1901, p. 3155], as well as to give any person or kind of traffic an undue preference or advantage. The plaintiff might have brought an action for damages under §§ 8 and 9 of the act, but it chose to make complaint to the Commission, thereby electing that as the exclusive remedy. The Commission, after a hearing, adjudged that the 66-cent rate worked unjust discrimination against barrel shipments, and ordered the defendants to make reparation to the plaintiff and others. The amount of the reparation was afterwards ascertained. An order prescribing the tariff in the future was made, but its terms do not seem to be material, as the claims for reparation were for the time between the establishment of the discriminating rate and the making of the Commission's order. The order for the future may or may not be a valid and enforceable one. The plaintiff's right under that order, in the absence of a demand for tank cars, may be uncertain. We need not pursue those inquiries. Here the only question is of the right of the plaintiff to recover damages for the alleged discriminatory rate collected from it before, and not after, the order of the Commission. The defendants declined to make the reparation ordered by the Commission, and the plaintiff sought to recover it by an action, brought under § 17 of the act, in which the defendants were entitled to a trial by jury. On the trial the statute makes "the findings of fact prima facie evidence of the matters therein stated." They, with other evidence, were submitted to the jury. The jury was instructed that whether the plaintiff had been subjected to undue prejudice was a question of fact. The jury was further instructed as follows:

"In arriving at that conclusion, it is proper to call your attention to this point: that the mere fact that there is or may be a preference or advantage given where refined oil is shipped in some other way,—for example, in tank cars,—and that a more favorable rate is given to tank-car shippers, does not, in and of itself, show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that the jury, before it can adjudge these companies to have acted unlawfully, to have subjected refined oil in barrels to any undue or unreasonable prejudice or disadvantage, must ascertain the facts and must give due regard to these facts and matters which railroad

men, apart from any question arising under the statute, would treat as calling for a preference or advantage to be given; for example, in this case, to oil shipped in such tanks. All such facts may and ought to be considered and given due weight by the jury in forming its judgment, whether such preference or advantage is undue or unreasonable. In the complexity of human affairs, and especially in commercial affairs, absolute uniformity is well-nigh impossible, and some prejudice or disadvantage often occurs where men desire to act with the utmost fairness. It is, however, where such prejudice or disadvantage in interstate commerce reaches the measure of undue or unreasonable that the act makes it unlawful.

"It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proofs, and justly, fairly, and impartially to determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established between these two companies (if you find that to be the fact), did subject the oil shipped in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"If you so find, you will also determine to what extent was the rate undue and unreasonable, and whatever amount you so find under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made and on which it has paid the undue and unreasonable amount. You will understand that it is not entitled to recover all the freight it paid, because part of it was undue and unreasonable, but it is only such part of the freight as you find to be undue and unreasonable that the plaintiff is entitled to recover back, and that only upon proof to you of the amount of the shipments made by it upon which the freight was unduly and unreasonably charged."

These instructions seem to me full and appropriate. The jury found a verdict for the plaintiff, thereby affirming that "the particular description of traffic" in which the plaintiff was engaged was subjected to "undue or unreasonable prejudice or disadvantage." I am not persuaded that we can say, as matter of law, that there was not sufficient evidence to be submitted to the jury and to warrant the verdict. Nor do I see any reason why the Lehigh Valley Railroad should not be held responsible. It had, with the other defendant, established a joint tariff for a continuous shipment between the states. That tariff has been found to be discriminatory and unlawful. It has received its share of the unlawful exaction. The 8th section of the act provides that a carrier who "shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful" shall be liable to the full amount of the damages sustained by one injured thereby. I see no escape for this defendant from this provision.

There may have been error committed during the trial which would require that the verdict should be set aside and a new



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trial granted. It is not necessary for me to consider this question. I go further than to dissent from the judgment of the court, which in effect denies the right of the plaintiff to recover upon the evidence against any of the defendants.

I am authorized to say that Mr. Justice HARLAN concurs in this dissent.

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**MAGEE v. NEW YORK, N. H. & H. R. Co.**

(Supreme Judicial Court of Massachusetts, Middlesex, April 1, 1907.)

[80 N. E. Rep. 689.]

**Carriers—Carriage of Passengers—Care Required.\***—It is the duty of a carrier to transport passengers so that they shall not suffer physical harm, unless in the exercise of the highest degree of care and skill consistent with the transaction of its business it becomes impossible by reason of unforeseen conditions.

**Same—Questions for Jury.**—In an action for injuries to a passenger, held a question for the jury whether defendant had been negligent.

Report from Superior Court, Middlesex County; John A. Aiken, Judge.

Suit by Josephine C. Magee against the New York, New Haven & Hartford Railroad Company. Verdict for defendant, and the case reported to the Supreme Judicial Court. Verdict for defendant set aside, and judgment entered for plaintiff.

*Alfred Hemenway and J. Weston Allen*, for plaintiff.

*Choate, Hall & Stewart*, for defendant.

RUGG, J. The only question raised by this report is whether there was sufficient evidence of the negligence of the defendant to warrant a submission to the jury. The case is a close one, but in view of all the circumstances it cannot be said that there was not. A passenger seated in a railroad train has a right to expect transportation without bodily injury. To put the proposition conversely, it is the duty of a common carrier of passengers to carry those whom it accepts for carriage so that they shall not suffer physical harm, unless in the exercise of the highest degree of care and skill consistent with the transaction of its business, this becomes impossible by reason of unforeseen con-

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\*For the authorities in this series on the question of the degree of care required of a carrier of passengers, see foot-notes appended to *Gri-City Ry. Co. v. Gould* (Ill.), 21 R. R. R. 758, 44 Am. & Eng. R. Cas., N. S., 758; *Moody v. Boston & M. R. R.* (Mass.), 21 R. R. R. 752, 44 Am. & Eng. R. Cas., N. S., 752; foot-notes appended to *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 20 R. R. R. 782, 43 Am. & Eng. R. Cas., N. S., 782; foot-notes appended to *Alton Light & Traction Co. v. Oliver* (Ill.), 20 R. R. R. 33, 43 Am. & Eng. R. Cas., N. S., 33; foot-notes appended to *Hayne v. Union St. Ry. Co.* (Mass.), 19 R. R. R. 66, 42 Am. & Eng. R. Cas., N. S., 66.



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ditions. When the plaintiff entered into the contract with the defendant to carry her from New York to Boston, and took her place in the seat provided, she was entitled to safe carriage under ordinary conditions. While the train was running at an "extra rate of speed" it comes to a sudden stop within the space of a few feet, and the plaintiff is thrown forward from her seat, and injures her knee against the chair in front. There is some evidence that she is insensible for a brief time. As soon as she observes anything, the passengers are gathered in groups, and all the male passengers get out of the car. In about five minutes a man in the railroad uniform requests of all the passengers to get out of the car. Complying with this request, she sees a crowd looking at the front of the car, and several railroad men working there. A gentleman is pointing out to his little boy a bent bar of iron which was a part of the coupling apparatus which joins two cars together, and which was not in the position it should have been, and is commenting about the occurrence. As soon as she noticed the locomotive and baggage car they were some distance up the track. The car in which she was riding was taken out of the train, and a much older and dust-covered car was substituted. There was a shed or small station near by, but it was not a scheduled stop of the train. This combination of circumstances, unexplained, warrants a conclusion that there was an irregularity, amounting to negligence, in the operation of the train where regularity was to have been expected. The plaintiff has told all that the ordinary woman passenger in like plight would be apt to know or have the opportunity to discover respecting the accident. Her narration of the events conveys a definite conception of specific physical facts, which do not, in the ordinary course of events, happen to a carefully operated train composed of cars in good repair and equipped with safe and adequate appliances. If the incident occurred by reason of any conditions beyond the control of the defendant, this was peculiarly within the knowledge of the defendant. But it did not offer any explanation. In the absence of any such explanation, an inference was justified that the injury to the plaintiff probably came from a cause for which the defendant was responsible. *Feital v. Middlesex R. R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *White v. Boston & Albany R. Co.*, 144 Mass. 404, 11 N. E. 552; *Griffin v. Boston & Albany R. R. Co.*, 148 Mass. 143, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526; *Savage v. Marlboro St. Ry. Co.*, 186 Mass. 203, 71 N. E. 531; *Hebblethwaite v. Old Colony St. Ry. Co.*, Mass. 295, 78 N. E. 477. The case is distinguishable from *Byron v. Lynn & Boston R. R. Co.*, 177 Mass. 303, 58 N. E. 1015, *Timms v. Old Colony St. Ry. Co.*, 183 Mass. 193, 66 N. E. 797, and *Weinschenk v. N. Y., N. H. & H. R. R. Co.*, 190 Mass. 250, 76 N. E. 662, relied upon by the defendant, in that in those cases there was no evidence except a jolt or jar offered to prove the negligence of the defendant. In and of themselves these are not unusual and extraordinary conditions of travel. There are

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several facts in the present case wholly out of the ordinary experience of travel upon railroads. In accordance with the terms of the report, the entry must be

Verdict for the defendant set aside, and judgment entered for the plaintiff for \$4,000.

**WILLIAM T. HARDIE & Co. v. VICKSBURG, S. & P. RY. Co.**

(Supreme Court of Louisiana, Jan. 7, 1907.)

[42 So. Rep. 793.]

**Carriers—Action on Bill of Lading—Failure to Deliver.**—Suit was brought by plaintiff against defendant on a bill of lading negotiable in form.

**Same—Negotiability.\***—Bills of lading are to be taken in the same manner, to the same extent, as bills of exchange and promissory notes. St. 1868, p. 194, No. 150, on the subject.

**Custom and Usage—Bills of Lading.**—According to the uncontradicted testimony of plaintiffs under local custom of merchants, and as relates to that custom, the bill of lading was not functus officio on the day that it was transferred to them. The time that had elapsed from the date it was issued was not unreasonable.

**Carriers—Liability of Warehouseman.**—The carrier, who deposits the goods carried in a warehouse for safe-keeping, in time incurs the liability of a warehouseman, and from that point of view the warehouseman's receipt is negotiable.

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; Luther Egbert Hall, Judge.

Action by William T. Hardie & Co. against the Vicksburg, Shreveport & Pacific Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

*Stubbs, Russell & Theus*, for appellant.

*T. M. & J. D. Miller* and *Andrew Augustus Gunby*, for appellees.

BREAUX, C. J. Plaintiffs instituted this suit against the defendant for \$3,637.76 on three bills of lading issued by defendant in negotiable form for 50 bales of cotton.

From a judgment rendered for plaintiffs for \$2,250, allowed to them by the judgment, as well as some interest, the defendant appeals.

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\*See foot-notes appended to *Kentucky Refining Co. v. Bank* (Ky.), 21 R. R. R. 711, 44 Am. & Eng. R. Cas., N. S., 711; foot-notes appended to *Roy & Roy v. Northern Pac. Ry. Co.* (Wash.), 20 R. R. R. 739, 43 Am. & Eng. R. Cas., N. S., 739; foot-notes appended to *Henderson v. Louisville & N. R. Co.* (La.), 20 R. R. R. 644, 43 Am. & Eng. R. Cas., N. S., 644.

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The bills of lading issued by the defendant company were, on the day that they were issued, deposited by Dr. F. A. Brown, to whom they were issued, with the Merchants' & Farmers' Bank of Monroe as collateral security to secure the account which he had with that bank. They remained on deposit with that bank about seven months. At the end of that time they were withdrawn from the bank by Brown and mailed by him to plaintiffs, with the request of plaintiffs, in view of these bills of lading forwarded as collateral security to secure a draft drawn by him on them for the amount allowed, that the draft be paid.

After receipt of these bills of lading and payment of said draft, plaintiffs notified defendant's agent at Vicksburg, Miss., to reship the cotton to them at once.

The officers of defendant, after having made some search, found that they could not deliver the cotton, for the reason that it had already been delivered to Lum & Co., of Vicksburg.

Plaintiffs had not previously received the least notification of the delivery of the cotton to the last-mentioned firm.

It will require but a moment to state how it happened that the cotton was erroneously delivered, and why it was that delivery was made of the cotton without requiring the surrender of the bills of lading.

F. A. Brown, during the season of 1902-03, shipped about 400 bales of cotton from Rayville, La., to the Firm of Lum & Co., cotton merchants, at Vicksburg, Miss. It was all properly delivered to the firm, but in November, 1902, Brown chose to make a change—to have the bills of lading made differently from those which had previously been issued to him. He had them made to shipper's order. He thereby retained full control of his shipment.

After it had been carried over by defendant to the place of destination, it was delivered by it for storage and safe-keeping at the compress of the Vicksburg Cotton Press Association.

It does not appear whether the defendant road directed this warehouse to deliver the cotton to J. J. Lum & Co., or whether the warehouseman assumed that the shipments were intended for that firm, because of the fact that the other cotton of the consignor, Brown, had been delivered to it.

The defendant does not seem to dispute plaintiffs' averment that the warehouse was its agent, and that the error in delivering the cotton to Lum & Co., without previously requiring the bills of lading or without any authority from the shipper, who was its consignor, was its own error.

The pleadings and the testimony lead us to the conclusion that, defendant having undertaken to transport the cotton and deliver it to the consignee, in this instance it held itself bound until delivery had been made to the proper person.

The following is, in substance, that part of defendant's answer pertinent to the subject.

That it transported the cotton to its destination and delivered it for storage and safekeeping at the compress and warehouse

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of the Vicksburg Cotton Press Association; that during the cotton season of 1902, prior to the shipments hereinbefore described, F. A. Brown, agent, had shipped his cotton, consigned to and in care of J. J. Lum & Co., a cotton commission and brokerage firm, and that the cotton press association, believing that the cotton in controversy herein was also intended for said firm, delivered 50 bales of cotton to J. J. Lum & Co. in error and without respondent's authority.

This delivery was made by the warehouse without requiring the presentation of the bills of lading or any authority from the shipper, who was his own consignee.

Lum & Co. sold the 50 bales at different dates from December, 1902, to March, 1903, for the account of the consignor, Brown, owner and holder of the bills of lading sued on, and the proceeds of the sale were paid to him; the last payment having been made in June, 1903.

In substance, the respondent avers, further, that at the date said bills of lading were delivered and negotiated to the plaintiff, as alleged in its petition, said bills of lading were without effect, having been satisfied by the sale of the cotton and the receipt of the proceeds thereof by the consignor; that their dates were notice against their negotiability.

It is a fact, as alleged, that the cotton was sold by Lum & Co., and the evidence shows that accounts of the sales were furnished by them to Brown. The members of the firm testified, and their testimony is uncontradicted, that the bills of lading were with the Merchants' & Farmers' Bank, because both the shipper and the president of the bank had informed them of that fact before they came into their possession. The members of the firm speak of these bills of lading as having been pledged to the bank to the date they were delivered to Brown and mailed by him to them. They state under oath that these bills of lading were acquired by them in the usual manner.

Plaintiffs have testified, and their testimony is not contradicted, that their claim is based on information received by them both as to weight and quality from the shipper; that according to the custom of merchants in this locality bills of lading are considered good and valid, although seven months have elapsed from the date that they are issued; that the transaction is not at all unusual; that there was not the least occasion to make an investigation; that they never refused to accept a shipper's order and bill of lading, because it was six months old; that the period was not extraordinary; that the bill of lading was an obligation on the part of defendant to deliver the cotton upon their surrender of the bill of lading, properly indorsed, and that there was no statement in the bill of lading to lead them to think that it would not be as good six months after it had been issued as at any other time; that there was nothing unusual in their appearance; that they had been informed that it had been held in trust by the bank for some time, and they had no cause to suspect that the railroad

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had departed from its usual custom of requiring the bill of lading before the delivery of the cotton; that they took the bill of lading with the expectation of getting the cotton for use in their business, and that they were in a position which compelled them to pay the shipper's draft after they had consented to accept the bill of lading; that they could not have delayed payment of the draft and retained the bill of lading long enough to have the whereabouts of the cotton investigated, even if there had been reason for their making such investigation; that the surrender of the cotton without the bill of lading was a most unusual occurrence. These witnesses also added, in substance, that the railroad may sell property transported and warehoused by it after a year has elapsed for account "to whom it may concern."

The question is whether, under the statutes of the state, a bill of lading is negotiable in a restricted sense only, or whether in a broad sense.

In a number of jurisdictions, a bill of lading is taken in a restricted sense.

It must be said that, in the jurisdictions in which bills of lading are taken in the restricted sense only, there is no statutory regulation upon the subject, or at any rate no statutory regulations such as we have in Louisiana. They are not as strongly expressed in favor of the negotiability of a bill of lading.

Under the common law, a bill of lading is regarded strictly as a symbol of the goods. The pledgee of the bill of lading has no more title to the goods than if the goods themselves were delivered to him. Am. & Eng. Ency. of Law, vol. 18, p. 629.

Under the common law, prior to Acts 1868, p. 194, No. 150, it was, in substance, held that the bill of lading was not in all respects negotiable. *Adams v. Trent*, 19 La. Ann. 262.

Since the statute above referred to was adopted, the meaning of the statute should govern.

Bills of lading, under the statute cited above, are to be taken in the same manner and to the same extent as bills of exchange and promissory notes now are.

There is no room left for the least difference between bills and notes and bills of lading. As to negotiability, one is to be taken as the equivalent of the other.

The full negotiability of bills of lading was recognized in the case of *Delgado v. Wilbur*, 25 La. Ann. 83.

It is true that subsequently a different opinion was expressed. *Hunt v. R. R.*, 29 La. Ann. 448.

The court was not unanimous. Two of the justices dissented. Justice Spencer, in his minority opinion, said:

"The law of 1868 was enacted in the interest of commerce; it created one of the most important branches of our credit; it secures the most legitimate transaction; it sanctioned, legalized, and protected a fair, but imperfect, custom, which perished before its adoption; and it is by far more wise and more equitable than the vacillating and doubtful jurisprudence of other states."

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That view impresses us. It is consonant with the letter and spirit of the statute in question, and forcibly commends itself as the correct construction. It occurs to us that the view of the majority should not be followed, and that the decision should be considered among the overruled.

The Lallande Case, 42 La. Ann. 705, 7 South. 895; went, as we think, beyond the necessity of the case.

There was a law which affected the negotiability of the bill of lading by reason of the fact that the commission merchant had transferred to a bank a bill of lading of one of his own customers, who owed him nothing, as a security to cover a debt of his own, although he did not own the cotton shipped and did not have the least claim to it.

In that case the factor's only right was to sell the property and account to his principal, who did not owe the factor anything.

Act No. 66, p. 114, of 1874, which is a statutory pledge, provides the extent of the factor's interest and to which he may transfer a bill of lading, that does not give him unlimited control of his customer's or principal's bill of lading, though the customer or principal owes him nothing.

In the Missouri law (referred to in the Lallande Case in error as applying) it is stated that bills of lading shall be negotiable by written evidence thereon and by delivery in the same manner as bills of exchange and promissory notes. This has been construed to mean that they were transferable in the same manner as negotiable notes, but that they only transferred the property. They were only a symbol of the thing itself, nothing more.

In interpreting this statute, the Supreme Court of the United States held that the negotiability was, by the terms of the statute, restricted; that the bill did not have the full negotiability of the commercial law. Shaw Case, 101 U. S. 565, 25 L. Ed. 892.

But it does seem to us that the Louisiana statute has a larger scope:

"Negotiable to the same extent as bills of exchange and promissory notes."

The last-cited decision, relating to the Missouri statute, is not, in consequence, as persuasive as it would be if it related to the Louisiana statute.

The statute of Maryland, on the other hand, is in effect similar to the statute of Louisiana; and in that state the law was construed to mean that bills of lading are negotiable instruments in full without restriction. Tiedeman v. Knox, 53 Md. 612.

Prof. Denis, in his work on "Pledge," who has made a special study of the subject, informs us that the statute of Maryland has rendered bills of lading fully negotiable.

He says:

"It is the law of France and other continental countries of Europe. The reason of such a rule, where it exists, is the same as



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the reason of the negotiability of bills of exchange and promissory notes—to promote commerce by facilitating financial operations.” Dennis on Pledge, §§ 390, 391, 393, *et seq.*

Having reviewed the decisions and referred to comments upon the subject of negotiability, we return to the Lallande decision only to state that we do not differ from the decree in the Lallande Case, but we differ from the opinion. It follows that our decree will be for defendant.

Another ground: The defendant sets up that it had delivered the goods for storage and safe-keeping at the compress and warehouse at Vicksburg, and that the warehouse delivered the cotton to Lum & Co. in error and without its authority.

The question arises at this point whether, after having delivered the cotton to the warehouse, the defendant was relieved from all further responsibility.

We think not. The following are our reasons:

The defendant had bound itself to safely carry the cotton to its place of destination and reasonably to take care of it. It could not, by delivering the cotton to a warehouse, escape all further liability.

The liability does not cease on the arrival of the goods at their place of destination and their delivery to a warehouse. *Columbus & W. Ry. Co. v. Ludden & Bates*, 89 Ala. 612, 7 South. 471.

The liability becomes exclusively that of a warehouseman. *Ayers v. Morris & E. R. Co.*, 29 N. J. Law, 393, 80 Am. Dec. 215; *National Line S. S. Co. v. Smart*, 107 Pa. 492.

The carrier retains the goods as depository, and not as carrier.

In one of the cases now before us, the goods were stowed by the carrier in a warehouse. The owner, owing to a misunderstanding, was not timely in claiming them. Held, that the court properly refused to instruct the jury that plaintiff should have removed the goods before three months had elapsed. *Wilson v. California Cent. R. Co.*, 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685.

The presumption is that, after the responsibility of the carrier ceases as carrier, it continues to be a warehouseman. 6 Cyc. 460.

It devolves upon the carrier to prove why it was that the goods were not delivered. In the absence of proof, it will not be presumed that the warehouseman, and not the carrier, is liable under the circumstances of this case.

The warehouseman had it in his power to sell the goods at the expiration of 12 months for “account of whom it may concern.” It follows that the carrier first and the warehouseman afterwards cannot be annoyed after that time has elapsed, for they have it in their power to dispose of the goods.

A bill of lading, under the views before expressed, in time becomes equivalent to a warehouseman’s receipt, which also is made negotiable as commercial paper. See Acts 1902, p. 329, No. 176.

For reasons assigned the judgment is affirmed.

LAND, J., concurs in the decree.

BRENNER *v.* JONESBORO, L. C. & E. RY. CO.

(Supreme Court of Arkansas, March 11, 1907.)

[100 S. W. Rep. 893.]

**Carriers—Ejection of Passenger—Action—Damages—Humiliation.\***

—Where, in an action for the ejection of a passenger, he testified that he was willing to get off the train, and that he intended to do so after the conductor refused his fare, and that he was going to be put off in order that he might bring an action, it was proper not to submit to the jury the issue of humiliation.

Appeal from Circuit Court, Craighead County; Allen Hughes, Judge.

Action by J. A. Brenner against the Jonesboro, Lake City & Eastern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Appellant endeavored to purchase a ticket from appellee's station agent at Manilla to Leachville, another station on appellee's road. The agent did not have the printed tickets, and did not have time to fill one out, so appellant through the negligence of appellee was unable to procure a ticket. The rules of the company required passengers without tickets to pay five cents per mile. The conductor upon the failure of appellant to produce ticket demanded of appellant the extra fare. Appellant refused to pay more than the regular fare for those having tickets. The conductor then ejected appellant from the train, at a point that was not a regular stopping place or station. Appellee's conductor used no more force than was necessary to accomplish the expulsion. The expulsion was unattended with insults or indignities. The appellant, after testifying to the facts which caused the expulsion, and the circumstances attending it, said that it was his purpose at the time the conductor refused to permit him to ride for 25 cents (the fare for those having tickets) to bring suit against the company. He said that he "was perfectly willing to get off the train, and that it was his intention to do so, after the conductor refused to take the 25 cents fare. He was going to be put off, so that he might bring suit against the company for the benefit of the people who were members of the Drummer's Association" to which he belonged. The above are the facts developed by the pleadings and proof. The court instructed the jury as follows: "Gentlemen of the jury, the plaintiff is entitled to recover in this case his actual damages, and you will assess his damages at what you believe from the evidence will compensate him for his actual damages and nothing more. (2) In assessing damages, you cannot take into consider-

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\*See foot-notes appended to *Georgia Ry. & Elec. Co. v. Baker* (Ga.), 13 R. R. R. 259, 36 Am. & Eng. R. Cas., N. S., 259; foot-notes appended to *Southern Ry. Co. v. Hawkins* (Ky.), 20 R. R. R. 21, 43 Am. & Eng. R. Cas., N. S., 21.

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ation any humiliation to plaintiff by reason of his wrongful ejection from the train." Appellant objected, and excepted to the ruling. The jury returned a verdict for \$25. Motion for new trial reserving exceptions was overruled. Judgment was entered for the amount of the verdict, and this appeal was taken.

*F. G. Taylor*, for appellant.

*E. F. Brown* and *W. J. Driver*, for appellee.

WOOD, J. (after stating the facts). The court was correct in not allowing the jury to consider the question of appellant's alleged humiliation in assessing the damage. Ordinarily, "the sense of wrong suffered and the feeling of humiliation and disgrace" resultant from an illegal expulsion from a train, in the presence of passengers, is a proper element in measuring the actual damages to the injured party. 6 Cyc. 566; *Wilson v. Northern Pac. R. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146. But this doctrine can have no application to a case where the passenger voluntarily suffers or seeks the expulsion in order to lay the foundation for a damage suit. The maxim "volenti non fit injuria" applies in such cases. Under the proof, it applies here. Appellant was not only willing to be expelled after the conductor refused to accept the fare he offered, but he actually desired the ejection, in order to enable him to bring suit. Humiliation is incompatible with such mental status. *Railway Company v. Trimble*, 54 Ark. 354, 15 S. W. 899. See, also, *St. Louis Southwestern Ry. Co. v. Knight*, 77 Ark. 20, 88 S. W. 1035.

Judgment affirmed.

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**ROY v. CHESAPEAKE & O. RY. CO.**

(Supreme Court of Appeals of West Virginia, March 26, 1907.)

[57 S. E. Rep. 39.]

**Carriers—Loss of Freight—Connecting Lines.\***—In the absence of a special contract, a railroad company, by receiving goods for transportation over its own line and other lines therewith connected, is only bound to carry the goods over its own line, and deliver them safely to the next connecting carrier.

**Same—Extending Liability.†**—A contract whereby the liability of the company is sought to be extended beyond such carriage and delivery will not be inferred from loose and doubtful expressions, but must be established by clear and satisfactory evidence. Taking a through fare on the receipt of the goods does not establish such liability.

(Syllabus by the Court.)

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\*See foot-notes appended to *Southern Ry. Co. v. Waters & Co.* (Ga.), 20 R. R. R. 480, 43 Am. & Eng. R. Cas., N. S., 480.

†See foot-notes appended to *Bell Bros. v. Western & A. R. Co.* (Ga.), 20 R. R. R. 751, 43 Am. & Eng. R. Cas., N. S., 751.

**Roy v. Chesapeake & O. Ry. Co**

Error to Circuit Court, Fayette County.

Action by M. L. Roy against the Chesapeake & Ohio Railway Company. From a judgment before a justice, defendant appeals, and, from a judgment for plaintiff in the circuit court, he brings error. Reversed and remanded.

*Simms & Enslow*, for plaintiff in error.

*M. W. Ryan* and *Jared L. Wamsley*, for defendant in error.

BRANNON, J. M. L. Roy brought an action before a justice against the Chesapeake & Ohio Railway Company, which went to the circuit court of Fayette county by appeal, and was there tried by a jury, and verdict and judgment went against the railroad company, and it sued out a writ of error.

A question is raised, as to bill of exceptions No. 2, whether it brings the evidence before this court. We think it is sufficient to do so. We need not discuss it, as the principles touching bills of exception have been amply stated in prior decisions of this court. We must not be overcritical and rigid in this matter, and thereby turn out of this court those seeking redress from erroneous decisions. The action is to recover damages for the loss of a box and trunk containing articles delivered to the railroad agent for shipment from Sewell Station, on the Chesapeake & Ohio Railroad, to a point in Randolph county not on its line. On the trial it was agreed by the plaintiff that two absent witnesses would, if present, testify that the Kanawha & Michigan Railroad Company received from the Chesapeake & Ohio Railway Company the box and trunk, and that they were delivered by the Chesapeake & Ohio Railway Company to the Kanawha & Michigan Railroad Company at Gauley Junction in good order, and were delivered by the Kanawha & Michigan to the Baltimore & Ohio Railroad Company at Point Pleasant. This agreement was read to the jury; but afterwards the plaintiff moved to strike it out as irrelevant and not material to the issue. This evidence was given to show that the loss occurred, not on the line of the Chesapeake & Ohio Railway, but on the Baltimore & Ohio. Is the Chesapeake & Ohio Company liable for loss of the goods occurring after they left its line? The Supreme Court of the United States in *Michigan C. v. Mineral Springs*, 16 Wall. (U. S.) 324, 21 L. Ed. 297, said that "the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." "In the absence of a special contract, a railroad company by receiving cattle for transportation over its own line and other lines therewith connected is only bound to carry the cattle over its own lines and deliver them safely to the next connecting carrier. A contract whereby the liability of the company is sought to be extended beyond such carriage and delivery will not be inferred from loose and doubtful expressions, but must be established by clear and satisfactory evidence. Taking a through fare on the receipt of

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the cattle does not establish such liability." *Myrick v. Michigan Central*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325. "In the absence of special agreement to extend its liability beyond its own line, such liability will not attach, and such agreement will not be inferred from doubtful expressions or loose language, but must be established by clear and satisfactory evidence." *Pennsylvania R. R. Co. v. Stewart*, 155 U. S. 333, 15 Sup. Ct. 136, 39 L. Ed. 176. "Liability of common carrier is limited to its own route, unless the contract is to carry the goods to their ultimate destination. Such contract is not established by proof that carrier received the goods with knowledge of their destination, and named the through rate therefor. In absence of special contract to deliver the goods at a point beyond its line, the receiving carrier is not liable for the loss or damage occurring to them after delivery to connecting carriers." *McConnell v. Norfolk & Western R. R. Co.*, 86 Va. 248, 9 S. E. 1006. Likewise is *Herring v. C. & O.*, 101 Va. 778, 45 S. E. 322. Many, many decisions so hold. 4 *Elliott on Railroads*, § 1432, says: "As a general rule, no carrier is bound by law to accept and carry goods beyond the terminus of its own line. In the absence of any agreement, either express or clearly implied, for transportation beyond its own line, the common-law duty of an independent carrier is performed by safely transporting the goods over its own line and delivering them to the consignee or connecting carrier, as the case may be. If, in such a case, the goods are to be delivered by the initial carrier to a connecting carrier for further transportation, the former is considered as a forwarding agent, rather than a carrier as to such further transportation, and is not liable for the default of subsequent carriers." 6 *Cyc.* 480, cites many of such cases. So does 6 *Am. & Eng. Ency. L.* (2d Ed.) 615. *Hutchinson on Carriers* (3d Ed.) § 231 (section 149), after saying that the English rule is different, says: "English rule denied in majority of states. On the other hand, the majority of our courts have pronounced with equal emphasis against the rule as unjust to the carrier, and as unnecessary upon any grounds of public policy, and have held that, in the absence of any other contract than such as is generally to be implied from the acceptance of the goods for carriage, the obligation of the carrier extends only to the transportation to the end of his route and a delivery there to the next succeeding carrier to further or complete the transportation. In order to be bound further, there must be a positive agreement, either expressed or implied, extending the liability; and the burden of proof will be upon the shipper to prove that such agreement was made." In such a matter, if we have any doubt, as we have not, we should follow the national Supreme Court. The rule is just. Why should one man or corporation be liable for the negligence of another where there is no agreement to be so? There is no evidence to prove any contract to carry beyond the line of the Chesapeake & Ohio Railroad, no payment of freight for carriage, indeed, no freight at all paid. As the

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evidence stricken out tended to prove a full defense under the law above given, the striking out of it is error.

Even if the agent had made any contract for carriage over other lines, it could not bind the company in the absence of proof of special authority to so contract. 4 Elliott on Railroads, § 1406, says that "a mere station agent will not, under ordinary circumstances, be presumed to have authority to bind the company by contract to carry freight beyond its own line." Much authority so holds. Hutchinson on Carriers (3d Ed.) vol. 1, § 241 (section 152a), reads thus: "Under the English rule and the cases adopting it, it is held that the agent authorized to receive the goods for carriage has implied authority to bind his principal by a contract for through carriage; but under the American rule it is held that, while the general freight agent of a railroad may have such authority, it will not be implied in the case of local freight agents from their general authority to receive and receipt for goods offered for transportation on the carrier's road; and the mere fact that a through rate of freight is collected, or that the goods are billed for through shipment, will be insufficient to support an inference that he has such authority." To charge the company, it is absolutely necessary, not only that there be a special contract for liability for loss on other lines of railroad, but also that the agent has power to make such contract. There is no shadow of evidence to show such authority in the agent; but, in fact, there is no shadow of the evidence going to show that the agent made any such contract.

There was evidence tending to show that some of the goods belonged to a woman who was not his wife or relative, but Roy's housekeeper. Evidence of the plaintiff as to the total value of all the goods in the box and trunk included those goods. The defendant asked, but was refused, an instruction that the plaintiff was "only entitled to recover the value of the goods owned by him, and not for goods of any other person shipped in his name." The refusal of this instruction is error.

We reverse the judgment, set aside the verdict, and remand the case for a new trial according to the principles above given.



## HARDING v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania, Feb. 4, 1907.)

[66 Atl. Rep. 151.]

**Carriers—Injury to Passengers—Contributory Negligence.\***—One riding on the running board of a summer car, outside of a lowered bar is negligent per se, and cannot recover for injuries received whether he could have got a safer position or not.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Frank V. Harding against the Philadelphia Rapid Transit Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

*John McConaghy, Jr.*, for appellant.

*Russell Duane and Thomas Leaming*, for appellee.

PER CURIAM. There was no evidence of defendant's negligence. The plaintiff had no recollection of the accident and the witnesses on his side who saw it only said in general terms that when the two cars passed each other the running board of the one on which plaintiff stood was crowded and several men jumped, fell or were pushed or brushed off. A witness for the defense testified that as the cars passed, a man on plaintiff's car extended his hand, grasped the other car, and was thrown backwards against the men behind him, including plaintiff. This is the most plausible account that was given, and apart from it there is nothing to show that plaintiff on the approach of the car did not lose his nerve and jump or fall from the car. Under the circumstances there was no presumption of negligence on the part of defendant, but even if it had been clearly shown, it would have been altogether immaterial. Plaintiff was riding voluntarily in a place of manifest danger, and in so doing he assumed all the risks of the situation. It is settled law that it is contributory negligence which will bar recovery, to stand on the platform, or the running board of a car, when a place can be reached inside. *Thane v. Traction Co.*, 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767; *Bumbear v. Traction Co.*, 198 Pa. 198, 47 Atl. 961. And it is equally clear that one who takes a position of manifest and im-

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\*For the authorities in this series on the question whether it is contributory negligence in a passenger to ride on the running board of a street car, see foot-notes appended to *Verrone v. Rhode Island Sub. Ry. Co.* (R. I.), 21 R. R. R. 685, 44 Am. & Eng. R. Cas., N. S., 685; foot-notes appended to *Abel v. Northampton Traction Co.* (Pa.), 20 R. R. R. 80, 43 Am. & Eng. R. Cas., N. S., 80; foot-notes appended to *Mason v. Boston & N. St. Ry. Co.* (Mass.), 19 R. R. R. 793, 42 Am. & Eng. R. Cas., N. S., 793; *Burns v. Johnstown Pass. Ry. Co.* (Pa.), 18 R. R. R. 605, 41 Am. & Eng. R. Cas., N. S., 605.

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minent danger assumes the risk of his position whether he could have got a safer place or not. *Bard v. Traction Co.*, 176 Pa. 97, 34 Atl. 953, 53 Am. St. Rep. 672; *Malpass v. Pass. R. R. Co.*, 189 Pa. 599, 42 Atl. 291.

It is argued by appellant that he was not warned by the conductor of the danger of his position. But the lower bar was sufficient warning in itself. It was notice that the running board on that side was a place of danger, and that passengers were not expected, nor so far as the company could control the situation, permitted, to use it, even for the limited purpose of getting on or off the car for which the running board is intended. The alternative offered by plaintiff of having to wait for another car and thus being late in getting home is no justification. In any other country than this, plaintiff would have been forcibly prevented from getting on the car at all after the number of passengers had reached the limit of safety or even of convenience. To attempt the enforcement of such a regulation here would certainly lead to continual quarrels and breaches of the peace. A reasonable amount of concession, therefore, to the American's impatience of control and confidence in his own ability to take care of himself should not be visited with punishment by the infliction of penalties on the company for the passenger's own fault. It must be definitely recognized that one who undertakes to ride on the running board outside of a lowered bar, is negligent per se, and cannot recover for injuries incident to his position, whether he could have got a safer position or not. Judgment affirmed.

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**CINCINNATI, N. O. & T. P. RY. CO. *et al.* v. GREENING.**

(Court of Appeals of Kentucky, March 19, 1907.)

[100 S. W. Rep. 825.]

**Carriers — Live Stock — Connecting Carriers — Actions—Parties.—**

Where a contract provided for the carriage of live stock from the point of shipment to destination at a stipulated price, but it also specified that the initial carrier should carry the stock over its line to C., and thence forward it by connecting carrier to destination, the two carriers participating in the shipment were properly joined in one action for damages caused by the negligent manner in which the stock was handled during transportation, though the liability of each carrier was limited to its own line.

**Same—Negligence—Weight of Evidence.**—A shipment of horses and mules was in transit nearly two days longer than should have been required, and when the animals were unloaded a number of them were bruised, cut, and in an impoverished condition. At the time an attempt was made to feed and water them in the cars without unloading because the carrier's pens were covered with ice and unsuitable for the purpose, the animals had been in the car for more than

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50 hours without food or water, in violation of Rev. St. U. S. § 4386 [U. S. Comp. St. 1901, p. 2995], requiring unloading for feeding, water, and rest after every 28 consecutive hours of transportation. Held, that such proof of negligence on the part of the carrier was not rebutted or weakened by evidence of the carrier's employees that there was no unreasonable delay or act of negligence on the part of the carrier, that the animals were observed to be in good condition at various points en route, and on arrival did not bear evidence of any greater hardships than those necessarily incident to such a trip.

**Same—Care Required.\***—While carriers of live stock are not insurers, they are bound to exercise a greater degree of diligence than is required of a mere bailee.

**Same—Negligence—Burden of Proof.†**—Where a shipment of live stock was received by a carrier for transportation in good condition, and was not accompanied by the owner or his representative, the burden of proof was on the carrier to show that injuries received by the stock in transit were not attributable to the carrier's negligence.

**Same—Connecting Carriers—Liability.‡**—A carrier, in the absence of an express contract to the contrary, is only liable for injuries that occur on its own line.

**Same—Connecting Carriers—Joint Liability—Proof.**—Where an action was brought against connecting carriers for injuries to live stock shipped without any person accompanying them, and both carriers denied all negligence and offered evidence in support of the denial, in the face of conclusive evidence of serious delay in transportation, and that the animals when delivered were injured, so that it was impossible for the jury to determine which of the carriers was to blame for their condition, a verdict charging the entire damages against each was proper.

Appeal from Circuit Court, Lincoln County.

"Not to be officially reported."

Action by W. C. Greening against the Cincinnati, New Orleans & Texas Pacific Railway Company and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

*J. W. Alcorn, Edward Humphrey, and John Galvin*, for appellants.

*E. V. Puryear, Robt. Harding, and Greene & Van Winkle*, for appellee.

CARROLL, C. Appellee brought this action in the Lincoln cir-

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\*For the authorities in this series on the subject of the degree of care required of a carrier of live stock, see foot-notes appended to *Illinois Cent. R. Co. v. Holt* (Ky.), 21 R. R. R. 455, 44 Am. & Eng. R. Cas., N. S., 455; foot-notes appended to *Louisville & N. R. Co. v. Smitha* (Ala.), 19 R. R. R. 775, 42 Am. & Eng. R. Cas., N. S., 775.

†See foot-notes appended to *Lehman, Stern & Co. v. Morgan's, etc., Co.* (La.), 18 R. R. R. 559, 41 Am. & Eng. R. Cas., N. S., 559.

‡See foot-notes appended to *Southern Ry. Co. v. Waters & Co.* (Ga.), 20 R. R. R. 480, 43 Am. & Eng. R. Cas., N. S., 480.

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cuit court against the Cincinnati, New Orleans & Texas Pacific Railway Company and the Southern Railway Company, to recover damages for injuries received by a load of horses and mules shipped from Moreland, in Lincoln county, Ky., to Atlanta, Ga. The contract of shipment was made with the Cincinnati, New Orleans Railway Company, whose line of road extends from Moreland to Chattanooga, Tenn. From Chattanooga to Atlanta the stock were shipped with its connecting carrier, the Southern Railway.

It is urged that the petition avers that the contract of shipment was made jointly with both carriers, whilst the reply and evidence clearly establishes that the contract was made with the Cincinnati, New Orleans Railway Company; the Southern Railway being merely the agent and connecting carrier of the first-named company for the transportation from Chattanooga to Atlanta. And therefore it is argued that, as the action is based on a joint undertaking and liability, there can be no recovery, as it is conceded that the undertaking and contract was several. The objection is not well taken. The averments of the petition are that the Cincinnati, New Orleans Railway Company operates and controls a line of railway running from Moreland to Chattanooga, and the Southern Railway Company operates a line of railway from Chattanooga to Atlanta, and is the connecting carrier of the first-named corporation. That the stock were delivered by appellee to the Cincinnati, New Orleans Railway for shipment to Atlanta, Ga., and were carried by it from the point of shipment to Chattanooga, at which place the Southern Railway received and accepted them under the contract made with the Cincinnati Railway, and carried them to Atlanta. It alleges, in substance, that each of the carriers undertook to transport the stock over designated portions of the road between Moreland and Atlanta, and describes where the terminal point of the receiving carrier ended, at which point its liability under the contract terminated, and where the stock were delivered to its connecting carrier. The contract with the Cincinnati Railway was for the carriage from Moreland to Atlanta at a stipulated price, but it was specified that it should carry the stock over its line to Chattanooga, and thence forward it by connecting carrier to the place of destination; the liability of the initial carrier only extending to the point where the stock was delivered to the connecting carrier. The two carriers were jointly sued, and it was proper to thus join them in one action. *P., C., C. & St. L. Ry. Co. v. Viers*, 68 S. W. 469, 113 Ky. 526; *L. & N. R. R. Co. v. Chestnut*, 72 S. W. 351, 115 Ky. 43.

The stock left Moreland in the afternoon of January 31st, and arrived in Atlanta at noon on the 3d of February, when in the ordinary and usual course of shipment they should have arrived there on February 1st, or about 24 hours after their shipment. It will thus be seen that they were in transit nearly two days longer than should have been required. When the stock were unloaded from the cars at Atlanta, a number of them were bruised, cut, and

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otherwise sore, and their condition was such that a loss of \$1,055 was sustained by appellee caused by the negligent and careless manner in which the stock was handled and cared for during transportation. Appellants deny that there was any unreasonable delay in the transportation, or that they are chargeable with any negligence or want of care or attention to the stock. In support of these defenses, they introduced the conductors who had charge of the trains that carried the stock from Moreland to Atlanta, and these employees, as well as the ones who assisted in unloading the stock at Atlanta, testified that there was no unreasonable delay or act of negligence, and that the stock were observed to be in good condition at various points during the trip, and upon their arrival at the place of destination did not bear evidences of any greater hardship than those necessarily incident to such a trip. That there was unreasonable delay is established beyond question by evidence of the time of the delivery of the stock and their arrival at Atlanta and the usual time required to make this journey. This evidence cannot be overcome, or indeed weakened, by statements of the employees of appellant that they were transported without unreasonable delay.

There is a sharp dispute as to the condition of the stock when they were unloaded from the cars at Atlanta, but the jury accepted the statements of appellee and his witness in preference to those of the employees of appellant, and their finding upon this controverted question of fact, supported by sufficient evidence to authorize it, will not be disturbed. Indeed, the amount of the verdict is not seriously questioned by appellants. As illustrative of the gross negligence of appellants in the transportation of this stock, we quote from the testimony of W. E. Barnett, the agent of the Cincinnati, New Orleans Railway at Oakdale, Tenn., who was introduced as a witness for appellants: "Q. State if you have any recollection of seeing a Cincinnati, New Orleans & Texas Pacific Railway Company car of stock on the night of February 2d. A. Yes, sir. Q. What was your duty in regard to them? A. To take care of them and feed and water them. Q. What did you do with them? A. I fed them 2½ bales of hay. Q. Where did you feed them? A. At Oakdale. Q. Did you take them out of the car? A. I did not. Q. Why? A. Because the chute was icy, and I thought it was best to feed them in the car. Q. What was the condition of the weather? A. Four degrees below zero. Q. What time did you feed them? A. About 9 o'clock p. m. Q. Where did you get the hay? A. From a freight house about a hundred yards away. Q. How did you carry it? A. On my back. Q. Will you tell the jury how you got it there? A. I punched it through the slats. Q. You didn't go in the door? A. I was at the end door. Q. You didn't go inside? A. Yes, sir. Q. What was you on, the horses' backs? A. Walked along and on the slats with my feet in the cracks. Q. Did you have a bale of hay under your arm? A. No sir; I was carrying hay, in my hand. Q. You did all the feeding through the slats? A. I said I got some through the slats. Q. How did you get that water

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through the slats? A. I didn't offer it to all of them. Q. How many did you offer it to? A. About a dozen. Q. What did you put it in. A. A bucket. Q. How did you get it in through the slats? A. I took it through the end door. Q. How many buckets did you put in there? A. One bucket. A. How many buckets did you take in? A. One bucket. Q. How much did you have left? A. None took any. Q. Whereabouts were you when you offered it to the horses? A. In the end of the car. Q. Can you explain why they were taken off the other train and put on 31? A. Time limit was up for feeding. Q. What do you mean by time limit for feeding? A. Stock is allowed to go 28 hours without feed. Q. And you were required to take them out of that car and feed them? A. Yes, sir. Q. And you didn't take them out? A. No, sir." This agent assigns as a reason why he did not take them out that the chute and stock pens were covered with ice, and, the horses being barefooted, he considered it unsafe to take them out of the car.

At the time the horses were fed and watered in the manner stated, they had been in the car more than 50 hours, and the record does not disclose that they were watered or fed at any other place, although the federal statute in force at the time these stock were shipped, and found in section 4386 of the United States Statutes [U. S. Comp. St. 1901, p. 2995], provides: "That no railroad company within the United States whose road forms any part of a line of road over which animals are conveyed from one state to another \* \* \* shall confine the same in cars \* \* \* of any description for a longer period than twenty-eight consecutive hours without unloading the same for rest, water and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm, or other accidental causes." Section 4387, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2996]. "Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case his default in doing so, then by the railroad company."

It is further insisted for appellants that as the trainmen testified that there was no unreasonable delay in the shipment, and that the stock was examined at different points along the route and found to be in good condition, there can be no recovery, as appellee failed to introduce any evidence showing negligence or carelessness on the part of the carriers. The evidence is uncontradicted that, when the stock were delivered to the carriers at Moreland, Ky., they were in first-class condition; when they were received by the shipper at Atlanta, Ga., they were bruised, cut, starved, and otherwise greatly injured. Neither appellee nor any person representing him accompanied the stock. They were in the exclusive care and custody of the carrier from the time they were received until their delivery, and, under circumstances like these, the carrier will not be exonerated from liability merely by introducing its employees to show that it was not guilty of any negligence in the transportation. It is true that carriers of live stock are not insurers as are carriers of goods and other inanimate



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freight, but, as said in *L., C. & St. L. R. Co. v. Hedger*, 9 Bush, 645, 15 Am. Rep. 740: "The company, when it undertakes the exercise of this public employment, should be held to a greater degree of diligence than that required of a mere bailee. The liability of the carrier, it is true, is greatly lessened by relaxing the rule applicable to carrying ordinary goods and wares. Still this modification of the principle does not relieve him from that high degree of diligence that the nature of the employment requires. In affording means of transportation, the company should be held to that degree of care and diligence that a prudent and careful person would exercise in such matters, and, if the live stock should be lost or injured while in the custody and care of the company, or its agents, for transportation, this should be *prima facie* evidence of negligence, and the burden of proof is on the carrier to rebut this presumption."

Where, however, the shipper accompanies the stock, then a different rule as to the burden of proof obtains. Thus, in the case *supra*, it is said: "Where the owner contracts, however, to load and unload his stock and to take charge of them during transportation, as in this case, and does in fact do so, the burden of proof, where the company is charged with negligence for the loss or injury to the stock, is upon the owner, as the party who has the care of the stock is presumed to know how the injury occurred, and must himself suffer the loss, unless negligence is shown on the part of the carrier or his employees." To the same effect is *L. & N. R. Co. v. Wathen*, 49 S. W. 185, 22 Ky. Law Rep. 82; *L. & N. R. Co. v. Harned*, 66 S. W. 25, 23 Ky. Law Rep. 1651. In *Hutchinson on Carriers*, § 1357, the rule is thus stated: "If live stock which is being transported is under the carrier's exclusive control, its delivery at destination in an injured condition will be *prima facie* evidence that the injury arose from some cause for which he was responsible, and he will be liable to the extent to which the shipper is damaged, unless he can show that the injury resulted from a cause for which he will be excused by the law or by the terms of his contract. But where, as is frequently the case, the shipper accompanies his live stock for the purpose of caring for it during the transportation, the same rule as to the burden of proof is held not to apply. The stock is not in the carrier's exclusive control or custody, nor are his means of information superior to those of the shipper, who is in a position to know as well as the carrier of the causes which produce the injury. In order, therefore, that the shipper who accompanies his live stock may recover for injuries received by him during the transportation, he must not only show that he himself was free from negligence, but that the injuries were caused by a breach of duty on the part of the carrier."

Therefore, the stock having been received by the carriers in good condition, and being in their exclusive custody, and not accompanied by the owner, the burden of proof was upon them to show how the injuries received by the stock occurred, and that they were not attributable to their negligence. And this they

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utterly failed to do. It is true that there is no direct evidence of neglect, except in the manner in which the stock were fed and watered at Oakdale, Tenn.; but the condition of the stock furnishes the best evidence of the neglectful manner in which they were handled and cared for. Nowhere does it appear that the injuries were due to the inherent nature or unruliness or viciousness of the animals; nor is it shown that the injuries were inflicted by the stock kicking or biting or fighting each other.

The jury were instructed that the Cincinnati, New Orleans Railroad was only liable for injuries occurring between Moreland and Chattanooga, and that the Southern Railway's liability was limited to injuries received between Chattanooga and Atlanta. The jury, however, did not find a separate verdict against each company. They found the full amount against both in a joint verdict, and on this verdict judgment was rendered for the whole sum against each company. Of this appellants complain. It is well settled that a carrier, in the absence of an express contract to the contrary, is only liable for injuries that occur upon its own line. *L. & N. R. R. Co. v. Chestnut*, 115 Ky. 43, 72 S. W. 351. And the court so charged the jury. But, under the evidence, the jury were unable to separate the liability. There was no evidence as to when or where or how the injuries were received. Both of the carriers denied all negligence and introduced their employees to show that there was none. Under this state of facts, the jury could not make a separate finding against each of the carriers. They had no means of knowing which one's negligence caused the injuries complained of, and hence they did the only thing they could do—find the full amount against each of them. And this, under the facts of this case, was entirely proper. The burden of proof being on these carriers to exonerate themselves from the *prima facie* case of negligence, established by the condition of the stock when it was received and delivered, the burden also rested on them to show as between themselves which was liable in damages. If the Cincinnati, New Orleans Railway wished to relieve itself, it should have shown that the stock was delivered in good condition to its connecting carrier; and so, if the connecting carrier desired to place the burden of the loss upon the initial carrier, it should have shown the condition of the stock when received by it. Appellee did not know and could not know which carrier was negligent. He could not put the loss upon one more than the other. If, in cases like this, juries were obliged to find separate verdicts against each company, it would be the merest guesswork upon their part, unsupported by evidence. The carriers must adjust their several liabilities between themselves.

Wherefore the judgment of the lower court is affirmed.

MCGOVERN *v.* INTERURBAN RY. CO.  
(Supreme Court of Iowa, April 9, 1907.)  
[111 N. W. Rep. 412.]

**Carriers—Injury to Passengers—Negligence.\***—Though an interurban railroad, operating cars which for the accommodation of passengers stopped at highway crossings, was not required to provide a passenger platform at such crossings, it was required to exercise reasonable care to enable passengers to alight with as little danger as practicable, and where a car was stopped at a highway crossing, and a passenger invited to alight at a place more hazardous than that at which the car might conveniently have been stopped, the railroad was negligent.

**Same—Contributory Negligence.†**—A passenger on an interurban car, which stops for him to alight at a highway crossing, may assume that the car has been stopped in a portion of the highway where he is invited to alight, unless warned of danger, and is not conclusively negligent in accepting the invitation to alight at a place which is in fact unsafe, but the question of his negligence is for the jury.

**Same—Assumption of Risk.**—A passenger on an interurban car stopping at highway crossings does not assume the risk involved in stopping the car for him to alight at a more dangerous place than the usual place for alighting, where he had no knowledge of the added danger.

**Same—Duty of Carrier.\***—An interurban railway company owes a public duty to a passenger to furnish him a safe place to alight at his destination, and is not relieved of that duty by knowledge on the part of the passenger that it had not previously been discharging that duty.

**Same—Assumption of Risk—Contributory Negligence.**—Where, in

\*For the authorities in this series on the subject of the duties and liabilities of carriers of passengers with respect to stopping places, see foot-notes appended to *Thompson v. Gardner, etc., Ry. Co.* (Mass.), 21 R. R. R. 480, 44 Am. & Eng. R. Cas., N. S., 480; foot-note appended to *Fitch v. Central R. Co.* (N. J.), 21 R. R. R. 475, 44 Am. & Eng. R. Cas., N. S., 475; foot-notes appended to *Moody v. Boston & M. R. R.* (Mass.), 21 R. R. R. 752, 44 Am. & Eng. R. Cas., N. S., 752.

†For the authorities in this series on the question, what constitutes an invitation to a passenger to alight from a car or train, see foot-notes appended to *Tilden v. Rhode Island Co.* (R. I.), 20 R. R. R. 809, 43 Am. & Eng. R. Cas., N. S., 809; *Davis v. Camden, etc., Ry. Co.* (N. J.), 20 R. R. R. 665, 43 Am. & Eng. R. Cas., N. S., 665.

For the authorities in this series on the subject of the right of a passenger to rely on the assumption that the carrier has performed, or will perform, its duties to him, see foot-notes appended to *Tennessee Cent. R. Co. v. Brasher's Guardian* (Ky.), 21 R. R. R. 419, 44 Am. & Eng. R. Cas., N. S., 419.

For the authorities in this series on the subject of the contributory negligence of passengers in alighting from cars, see foot-notes appended to *Chesapeake & O. Ry. v. Harris* (Va.), 18 R. R. R. 139, 41 Am. & Eng. R. Cas., N. S., 139.

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an action for injuries to a passenger while alighting from an interurban car, the same facts which would constitute contributory negligence would also constitute assumption of risk, there was no occasion to charge on assumption of risk after instructions as to contributory negligence.

**Trial—Instructions—Issues Submitted.**—Where, in an action by a passenger on an interurban car for injuries received while alighting at a highway crossing, the court, after instructing the jury to consider only the negligence alleged in the petition, stated categorically the grounds of negligence, without including the alleged negligence in carrying plaintiff beyond the platform at the crossing, the question whether the company was negligent in carrying plaintiff beyond the platform was not submitted.

**Carriers—Injury to Passengers—Evidence—Instructions.**—Where the evidence showed that the company did not maintain platforms at a highway crossing, but that approaches to the rails on either side had been planked by it, and the highway had been graded up to the planks, and that it was usual to stop cars for passengers to alight by stepping onto the approach, and that the company did not stop the car until after it had passed the approach, an instruction that if the company stopped the car to allow passengers to alight, and notified a passenger to alight at an unsuitable place, and failed to furnish a reasonably safe place, the jury might find that the company was negligent, was proper.

**Same.**—The action of the court in calling the attention of the jury to facts shown in evidence in determining whether the employees of the company should have assisted the passenger to alight, and leaving it for the jury to say whether there was negligence in not giving the passenger assistance, was proper, as the duty to assist passengers to alight might arise under special circumstances.

**Husband and Wife—Personal Injuries to Wife—Recovery.**—A married woman may recover in her own right for physical pain, suffering, and mental anguish resulting from the negligence of another

**Trial—Instructions—Evidence.**—Where, in an action by a married woman for a personal injury, there was no evidence of the loss of earning capacity, the refusal to charge that she could not recover damages on that account was proper.

**Appeal—Harmless Error—Instructions.**—Where, in an action for personal injuries, the jury properly found a verdict for \$3,000, an instruction on the measure of damages, stating that plaintiff in no event could recover more than \$15,000, the amount claimed in the petition, was not prejudicial.

**Same—Opinion Evidence.**—Where the questions asked medical witnesses and their answers, taken together, showed that they only testified that plaintiff's injuries were due to some external violence such as that which plaintiff without contradiction sustained, the overruling of objections to the questions as calling for statements as to the cause of the injury and usurping the functions of the jury was not prejudicial.

**McGovern v. Interurban Ry. Co**

Appeal from District Court, Polk County; Hugh Brennan, Judge.

Action to recover damages for personal injuries alleged to have been received by plaintiff, as a passenger, in dismounting from one of defendant's electric cars. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

*N. T. Guernsey*, for appellant.

*Dowell & Parrish* and *Gillispie & Bannister*, for appellee.

McCLAIN, J. Plaintiff, carrying an infant and a small satchel, and accompanied by another small child, attempted to dismount from defendant's car, on which she had been carried as a passenger to her destination at a country highway crossing, designated on her passage receipt as "Dailey's," and while doing so fell and was injured. At this crossing, though it was designated on the ticket as a station, there was, as plaintiff well knew, no station, nor station platform; but in the highway the approaches to the rails on either side had been planked by the company, and the highway had been graded up to the planks; and it was usual to stop cars so that passengers could dismount by stepping from the car steps to the approach to the crossing. The negligence of defendant as alleged consists in not furnishing plaintiff a safe place to alight; in stopping the car several feet east of this planking and approach in the highway, so that plaintiff was required to step down a greater distance, on account of the surface of the highway being lower at this point than the end of the ties, and inviting plaintiff to alight at this point, which was an unsuitable place for alighting; and in not notifying plaintiff of the danger or rendering her assistance in alighting.

1. The request of defendant that the jury be instructed to return a verdict in its favor, on the ground that there was no evidence of negligence, was properly overruled. While it was not the duty of defendant operating a car which, for the accommodation of passengers was stopped at any highway crossing where they desired to alight, to provide a passenger platform at each of such crossings, it was its duty to exercise at least reasonable care to enable plaintiff to alight with as little danger as practicable, and if the car was stopped, and plaintiff invited to alight, at a place more hazardous than that at which the car might conveniently have been stopped, then the defendant was negligent. The question was properly for the jury. *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Cartwright v. Railway Co.*, 52 Mich. 606, 18 N. W. 380, 50 Am. Rep. 274; *Bullard v. Boston & M. R. Co.*, 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367. The cases relied on for appellant are those in which it is held that a street car company is not liable to a passenger alighting from its car for injuries received after alighting, due to defects in the highway. See, for example, *Bigelow v. West End. St. R. Co.*, 37 N. E. 367, 161 Mass. 393; *Scanlon v. Phila. Rapid Transit Co.*, 208 Pa. 195, 57

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Atl. 521; *Conway v. Lewiston, etc., Horse R. Co.*, 87 Me. 283, 38 Atl. 110. In the case last cited it is said: "It should also be remembered that the defendant's cars were drawn by horses, and operated without regular stations or established places for passengers to get on or off the cars. They were not run from station to station only, but, upon signal or request, stopping as near the point desired as practicable either to take on or discharge passengers. It was undoubtedly the duty of the conductor to exercise all reasonable care, diligence, and prudence to ascertain the conditions existing at all points where the cars were to stop, and otherwise to promote the convenience and guard the safety of passengers at all times when entering or leaving the car." This language suggests a distinction which should be taken into account between street cars operated in the streets of a city which are stopped on signal, and interurban cars operated through the country, and which may be stopped at highway crossings. Cars of the latter description are stopped at any highway designated by the passenger, but the particular place in the highway at which the car shall be stopped is under the control of the conductor or motorman, and care should be exercised to stop the car at such place as is reasonably suitable for the purpose, as safe a place as can be reasonably selected.

2. What has just been said as to the duty of defendant is applicable in considering the question whether there was contributory negligence on the part of plaintiff. The passenger alighting from a street car does so at a place selected by him through his signal, and may reasonably be required to look out that it is safe to use it; but a passenger on an interurban car, which is stopped for him to alight at a highway crossing, may reasonably assume that the car has been stopped in a portion of the highway where he is invited to alight, unless warned of danger, and is not conclusively negligent in accepting the invitation to alight at a place which is in fact unsafe. The question of contributory negligence was to be determined by the jury in view of the circumstances. *Matthieson v. Burlington, C. R. & N. R. Co.*, 100 N. N. W. 51, 125 Iowa, 90.

3. The court was not in error in failing to submit to the jury the question of assumption of risk. Plaintiff did not assume the risk involved in stopping the car for her to alight at a more dangerous place than that where it usually stopped, for she had no knowledge of the added danger due to defendant's negligence. She had the right to assume that the car had not been stopped at a place for her to alight which was not the usual place and was more dangerous. *Eastland v. Clarke*, 165 N. Y. 420, 59 N. E. 202, 70 L. L. R. 751; *Hogarth v. Pocasset Mfg. Co.*, 167 Mass. 225, 45 N. E. 629. As to the alleged negligence in not providing a safe place to alight, such as a platform or something equivalent to it, there could be no assumption of risk by a passenger, for, as will be hereinafter indicated, the defendant owed a duty to such passenger to furnish him a safe place for alighting, and the doctrine of assumption of risk does not apply "to a case where the negligent course of con-



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duct which it is claimed had been assumed and recognized is connected with the discharge of a general duty to the public." *Carver v. Minneapolis & St. L. R. Co.*, 120 Iowa, 346, 352, 94 N. W. 862. The defendant owed the public duty to plaintiff to furnish her a safe place to alight at her destination fixed in the contract of transportation, and was not relieved of that duty by knowledge on the part of the plaintiff that it had not previously been discharging that duty as to herself or other passengers, stopping at that destination. That this is so must be self-evident, for, were it otherwise the defendant could relieve itself from the consequences of a violation of its duty to its passengers by so continuously and notoriously violating such duty that the passengers would be charged without notice that the duty would not be observed. If plaintiff had known that she had been carried beyond the usual place of alighting, she would, no doubt, have assumed the risk of such reasonable apparent dangers as were involved in alighting at such place; but the same facts would constitute contributory negligence, and there was no occasion to instruct on assumption of this risk, in view of the instructions given with reference to contributory negligence. Assumption of risk and contributory negligence are sometimes indistinguishable. 4 Thompson, Negligence, § 4611.

4. Error is assigned in submitting to the jury the question whether defendant was negligent, as alleged in her petition, in carrying her beyond the platform and regular stopping place at said station. Without now considering whether the planked crossing might not properly be designated as a platform, it is sufficient to say that, after telling the jury that they should "consider only the negligence alleged by the plaintiff in her petition as set forth in the statement immediately preceding these instructions," the court stated categorically the grounds of negligence which they could consider, and did not include therein the alleged negligence in carrying plaintiff beyond the platform. The jury could not have been misled.

5. Plaintiff specifically alleged negligence of defendant in not providing a suitable place at the station which was plaintiff's destination for her to alight, and the court submitted this question to the jury. Error is assigned on this instruction. As already stated, there was no station nor passenger platform at the highway crossing which was plaintiff's destination, although the place was designated on plaintiff's ticket by name as "Dailey's." The complaint is that by designating this place as a station, and telling the jury that if defendant stopped the car at this place for the purpose of having passengers alight therefrom, and invited plaintiff to alight at an unsuitable and unsafe place to discharge passengers from said car, and failed to furnish plaintiff a reasonably safe place to alight from said car, this would be an act of negligence on the part of the defendant, the court left it for the jury to say whether it was negligence on the part of the defendant not to have a station platform.

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Now, it may be conceded that defendant was not bound to maintain a passenger platform at every highway crossing where it stopped its cars to enable passengers to alight at their request, and that it would be improper to instruct the jury broadly, in every case, that there was a duty on the part of defendant to furnish a safe place to alight wherever a car might be stopped, for such direction might be taken to authorize recovery for injury received in stepping from the car step to the highway, no matter how carefully the place of stopping had been selected, on the theory that it was unsafe to step down even 17 inches, the distance from the lowest step to the level of the top of the rail. The instruction referred to, which is too long to be set out in full, is not entirely clear as to whether the negligence therein referred to was in not furnishing a safe place in general for passengers to alight, or in not selecting a suitable place in the highway for that purpose. But, assuming that the jury could construe it as requiring defendant to furnish a safe place in general, we think it was not erroneous as applied to the facts in this case. The contract was to carry plaintiff to "Dailey's," as a specific destination, which was thus indicated as a place where plaintiff might alight. This contract implied the duty to furnish plaintiff a safe place to alight at his destination. *Dougherty v. Kansas City, etc., Rapid Transit Co.*, 128 Mo. 33, 30 S. W. 317, 49 Am. St. Rep. 536; *Missouri Pac. R. Co. v. Wortham*, 3 L. R. A. 368, 73 Tex. 25, 10 S. W. 741; *Franklin v. Southern Cal. M. R. Co.*, 85 Cal. 63, 24 Pac. 723; *Raben v. Central Iowa R. Co.*, 74 Iowa, 732, 34 N. W. 621. With reference to the duty of defendant to furnish plaintiff a safe place to alight at "Dailey's," which was a place to which defendant specifically contracted to carry passengers, it was not error; therefore, to instruct that it involved the obligation to furnish them a safe place to alight. It does not follow that this duty involved the furnishing of a special platform in view of the nature of the transportation which defendant undertook to furnish, but it was for the jury to say whether, in view of the nature of the transportation, the place provided was a safe place. It may well be, as argued, that, at highway crossings not designated by the defendant as regular stopping places, it would not be negligent if it used due care in selecting as safe a place as practicable for a passenger to alight, although it did not provide any special conveniences or appliances for the use of passengers. *Cincinnati W. & M. R. Co. v. Peters*, 80 Ind. 168; *Alabama & V. R. Co. v. Stacey* (Miss.) 9 South. 345. There was no error in the instruction as given under the record in this case.

6. Exception is taken to an instruction with reference to the duty of defendant to furnish plaintiff assistance in alighting. In general, it is not the duty of the employees of a railroad company to give passengers assistance in alighting. *Raben v. Central Iowa R. Co.*, 74 Iowa, 732, 34 N. W. 621. But under special circumstances this duty may arise. *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa, 264; *New York, C. & St. L. R. Co. v.*

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Doane, 17 N. E. 913, 115 Ind. 435, 1 L. R. A. 157, 7 Am. St. Rep. 451; Cartwright v. Chicago, & G. T. R. Co., 18 N. W. 380, 52 Mich. 606, 50 Am. Rep. 274; Baltimore & O. R. Co. v. Leapeley, 4 Atl. 891, 65 Md. 571. The court called the attention of the jury to certain facts, shown in evidence proper to be considered by them in determining whether in this case there was such duty, and left it for them to say whether there was negligence on the part of defendant's conductor in not giving plaintiff assistance. In this there was no error.

7. An instruction as to contributory negligence is complained of, on the ground that it allowed the jury to take into account the knowledge, if any, which plaintiff had as to the distance from the step to the ground at the place where she was invited to alight, and it is argued that she should have been required also to take into account what she could have known in the exercise of ordinary care. An instruction embodying this thought was requested for defendant. But the complaint of the instruction given, as well as of the refusal to give the instruction asked, is predicated on the claim that plaintiff was as matter of law negligent, if she did not for herself ascertain whether it was dangerous to attempt to step to the ground at the place where the car was stopped, and she was invited to alight. This view is erroneous, as already pointed out in this opinion. Plaintiff had the right to assume that she was not invited to alight at a dangerous place.

8. In two respects there is complaint as to the direction to the jury with reference to measure of damages. In the first place, it is said the jury were allowed to take into account loss of earning capacity, which would be erroneous, as plaintiff was a married woman. But we understand the instruction complained of to limit recovery to physical pain and suffering and mental anguish. For this she could recover in her own right. As there was no evidence with reference to loss of earning capacity, it was not error to refuse defendant's requested instructions that plaintiff could not recover damages on that account.

The second ground of objection to the instruction on this subject is that the jury were told in no event to allow plaintiff more than \$15,000, which was the amount claimed in her petition. It is said that this was misleading, as the jury might infer that a verdict up to that amount would be proper; whereas, the evidence would not justify any such verdict. It is no doubt improper to so state the limitation as to suggest a verdict for the amount claimed. *Rost v. Brooklyn Heights R. Co.*, 41 N. Y. Supp. 1069, 10 App. Div. 477; *Gilbertson v. Railway Co.*, 43 N. Y. Supp. 782, 14 App. Div. 294; *Illinois Central R. Co. v. Souders*, 53 N. E. 408, 178 Ill. 585; *Joyce on Damages*, § 207. But the verdict was for \$3,000, and there is no occasion to surmise that the amount fixed was in any way influenced by the statement that it should not exceed \$15,000. Under the evidence, the amount allowed was not excessive, and we think it clearly appears that defendant was not prejudiced by the lan-

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guage used. Some direction on the subject is proper in connection with an instruction as to measure of recovery, and the court would not have been justified under the evidence in fixing an absolute maximum less than that named in the petition. We do not find in the language used any suggestion that a verdict of \$15,000 would be proper under the evidence. It might have been safer to explain in a few words that the maximum was stated because that was the sum claimed which must limit plaintiff's recovery; but in this case it clearly appears that the jury was not misled by the omission of such explanation.

9. Exceptions were taken to the overruling of objections to questions asked medical witnesses as to what was the cause of the injury on which plaintiff asked recovery, and error is assigned on such rulings because, as claimed, the witnesses were asked to usurp the functions of the jury. But the questions and answers, taken together, show that the witnesses only testified that plaintiff's injuries were due to some such external violence as that which plaintiff suffered, and there could have been no prejudice. There was no question under the evidence as to the fact that the injuries complained of resulted from the accident.

We have noticed as fully as reasonable space will allow all the alleged errors set out in appellant's argument.

Finding no error which would justify a reversal, the judgment is affirmed.

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**WALKER v. SOUTHERN RY. CO.**

(Supreme Court of South Carolina, March 14, 1907.)

[56 S. E. Rep. 952.]

**Carriers—Injury to Goods Shipped—Burden of Proof.\***—The burden is on the carrier, delivering the goods shipped in a damaged condition, to show that it was done while they were in the care of another carrier; and the rule is applicable to a loss of one horse from a car load of horses.

**Same—Trial—Directing Verdict.**—In an action for the loss of a horse out of a car load, the verdict should not be directed for defendant where it is not clearly shown that he was dead in the car when delivered to defendant by connecting carrier.

**Carriers—Injury to Freight—Filing Claim.†**—Filing claim for injuries to freight with the cashier at the office of defendant at the destination of the shipment, who was in charge of the business in the absence of the agent having general charge, was a sufficient com-

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\*See preceding case, and foot-notes.

†For the authorities in this series on the subject of notice of claims against railroads, see foot-notes appended to *Cornelius v. Atchison, etc., Ry. Co.* (Kan.), 22 R. R. R. 222, 45 Am. & Eng. R. Cas., N. S., 222; *St. Louis & S. F. R. Co. v. Phillips* (Okl.), 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201; *Atchison, etc., Ry. Co. v. Poole* (Kan.), 21 R. R. R. 449, 44 Am. & Eng. R. Cas., N. S., 449.

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pliance with the statute requiring the claim to be filed with the agent of the carrier at the point of destination.

**Appeal—Review.**—The Supreme Court will not consider a constitutional question raised for the first time on appeal.

**Evidence—Best and Secondary.**—Where three bills of lading are made out, one signed by the shipper and sent to the auditor of the carrier, and one sent to the shipper, and a third, to which the signatures of the other two are copied, was filed in the initial office, the last was a copy, and could only be admitted as secondary evidence.

**Carriers—Loss of Freight—Interest.†**—In an action for the loss of freight, interest should be allowed on the value of the property fixed as measure of damages.

Appeal from Common Pleas Circuit Court of Union County; Prince, Judge.

Action by A. P. H. Walker against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

*Sanders & De Pass and Townsend & Townsend*, for appellant.  
*J. Ashley Sawyer*, for respondent.

WOODS, J. The Louisville & Nashville Railroad Company received from the plaintiff, Walker, at Louisville, Ky., nine horses, to be delivered at Jellico, the junctional point, to the defendant, the Southern Railway Company, for carriage to Union, S. C., the ultimate destination. Only eight horses were found in the car on its arrival at Union. The plaintiff made out his claim against the Southern Railway Company for \$142.50, the price paid for the missing horse in Louisville, attaching the bill of lading which had been sent to him. When the plaintiff went to the station at Union to present his claim, the agent in general charge of the office was absent, and the claim was filed with the cashier of the office, who acted for the agent in charge when he was out. The claim was not paid in 90 days, whereupon the plaintiff brought this action, alleging as a first cause of action damages for the loss of the horse to the amount of \$300, and as a second cause of action the liability of the defendant for the statutory penalty of \$50 for failure to adjust and pay within 90 days the claim filed. The plaintiff recovered judgment for \$225. The appeal relates to three defenses set up in the answer: (1) Delivery by the defendant to the plaintiff of all the horses received by it from the Louisville & Nashville Railway; (2) limitation in the bill of lading issued by the Louisville & Nashville Railroad Company to liability of \$75 for each horse; (3) failure by the plaintiff to file his claim with the agent of the defendant

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†For the authorities in this series on the subject of the right to interest on the amount of damages recovered in negligence and eminent domain cases, see foot-notes appended to *St. Louis, etc., Ry. Co. v. Oliver* (Okl.), 22 R. R. R. 167, 45 Am. & Eng. R. Cas., N. S., 167.



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at the point of destination, such filing being, under the statute, a condition precedent to the recovery of the penalty demanded.

1. Error is assigned in the refusal to grant a motion for a nonsuit on the ground that there was no evidence showing the lost horse ever came into possession of the defendant. It was said in *Willett v. Railway*, 66 S. C. 478, 45 S. E. 93: "The general rule is that the burden is on the carrier which delivers the goods to the consignee to respond to any damage which occurs in transit, or show that it was done while in the hands of some other carrier. This rule has never been under judicial discussion in this state, but it is supported by the great weight of authority elsewhere." The application of this rule to the case now under consideration is denied by the defendant, because this is not a case of damage to goods received by the initial carrier in good order and delivered by the terminal carrier in a damaged condition, but of the complete loss of a part of the property shipped. Authority has been adduced in favor of the view that a presumption of loss by the terminal carrier does not arise where no part of the goods received by the initial carrier reached their destination. In such case the argument is that there is nothing whatever to show that the terminal carrier ever received the goods, and therefore there is no foundation for the presumption that it lost them. But this case is entirely different. The shipment was a single car load of nine horses. The defendant received the car from the initial carrier and delivered the horses contained in it as a single shipment. All the horses were in the car and in good condition when shipped from Louisville, and they are all presumed to have so continued in the car when it came into the hands of the defendant. The principle and reasoning on which the case of *Willett v. Railway*, supra, was decided are as applicable to the failure of the terminal carrier to deliver all of a car load which came into its hands as to the delivery of a single article in a damaged condition. *Faison v. Railway*, 13 South. 37, 69 Miss. 569, 30 Am. St. Rep. 577; *Cooper v. Railway*, 9 South. 159, 92 Ala. 329, 25 Am. St. Rep. 59; *Railway v. Harris*, 7 South. 544, 26 Fla. 148, 23 Am. St. Rep. 551; *Smith v. Railway*, 43 Barb. (N. Y.) 225. The motion for nonsuit on this ground was, therefore, properly overruled.

2. On the same point it is insisted the evidence adduced by the defendant, after the refusal of nonsuit, affirmatively showed beyond all doubt the missing horse was lying dead in the car when it was received by the defendant from the Louisville & Nashville Railroad Company; and it is submitted the circuit judge erred in refusing to direct a verdict for the defendant. The evidence tending to that inference was certainly very strong, but we do not think strong enough to warrant the court in saying no other inference could be drawn from it. The car reached Jellico at about 2:15 a. m., and one of the defendant's witnesses testified he found the horse dead when he examined the car from three-quarters of an hour to an hour afterwards. But this witness stated nothing indicating whether the horse died before or after arrival. It is



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true other witnesses concerned with the transfer of freight at Jellico said they saw the horse and he was cold and stiff; but this was several hours after the arrival of the car. It does not clearly appear whether the car was still in the custody of the Louisville & Nashville Railroad Company, or had then passed to the care of the defendant. The presumption of loss by the defendant, the terminal carrier, was not so conclusively rebutted as to warrant the court in directing a verdict.

3. Filing the claim with the cashier of the Union office of defendant, who was apparently in charge of the business in the absence of the agent having general charge, was manifestly a sufficient compliance with the statute, which requires the claim to be filed with the agent of the defendant at the point of destination. The case of *Brown v. Railway*, 71 S. C. 273, 51 S. E. 151, is different.

4. The attack on the constitutionality of this statute, being made for the first time in this court, cannot be considered. *Lowmore v. Mfg. Co.*, 60 S. C. 153, 38 S. E. 430.

5. For the purpose of showing the limitation of liability to \$75 for each horse, the defendant sought to introduce a copy of the bill of lading. The evidence showed the bill of lading was issued in triplicate. Only one was signed by the shipper, and this was sent to the office of the auditor of the Louisville & Nashville Railway as the original. On the others the signatures were copied, one sent to the shipper, and the other retained for filing. The defendant offered the copy retained for filing, alleging the loss of the original and the copy given to the shipper. Plaintiff attached the bill of lading received by him to the claim, and at the time of the action it was still in the hands of the defendant. It seems plain the paper signed by the shipper and sent to the auditor, and that accepted by the shipper, should each be regarded for all practical purposes the original bill of lading. Both of them express the contract and evidence the assent of the parties. The paper retained for filing, not being signed by the shipper nor accepted by him, is only a copy, and therefore admissible only as secondary evidence on proof of loss of the original. We agree with the circuit judge that there was no such evidence of loss of the originals as would make the copy admissible. Nor was it admissible because offered only on a collateral issue. One of the main issues was whether the shipper had agreed to a limitation of liability, and this paper was offered as furnishing the direct proof of such agreement.

6. The case of *Woods v. Cramer*, 34 S. C. 518, 13 S. E. 660, is conclusive that there was no error in charging that interest should be allowed on the value of the property fixed as the measure of the damages.

It is the judgment of this court that the judgment of the circuit court be affirmed.

ST. LOUIS, I. M. & S. RY. CO. *v.* RENFROE.

(Supreme Court of Arkansas, March 11, 1907.)

[100 S. W. Rep. 889.]

**Carriers—Carriage of Goods—Character of Goods.\***—Where a carrier undertook to transport a shipment of strawberries, it was its duty to furnish a car adapted to the preservation of the shipment.

**Same.\***—Where a carrier undertook to transport a shipment of strawberries and to furnish a refrigerator car and to ice the same, it could not escape liability for damage to the shipment because of a failure to properly ice the car by showing that the car belonged to another corporation and that under the agreement between it and the carrier the duty of icing the car devolved on the other corporation.

**Same—Presumptions—Connecting Carriers.†**—In the case of connecting carriers, in the absence of evidence, it is presumed that any injury to the shipment was owing to the negligence of the delivering carrier.

Appeal from Circuit Court, Crawford County; J. H. Evans, Judge.

Action by T. H. Renfroe against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was a suit begun in the Crawford circuit court by the appellees to recover damages, which, it was claimed, they had suffered by reason of the failure of the St. Louis, Iron Mountain & Southern Railway Company to keep properly iced a refrigerator car load of berries which, they allege, were shipped by themselves from Alma, Ark., to Kansas City, Mo.

Appellees alleged that the St. Louis, Iron Mountain & Southern Railway Company "was on the 27th day of April, 1905, the lessee, operator, and manager of a line of railway from Alma, Ark., to Kansas City, Mo." Appellees then alleged that they delivered to appellant 585 crates of strawberries in good condition, which appellant received and agreed to transport from Alma, Ark., to Kansas City, Mo., in consideration of the sum of \$107.36; and appellees alleged that in consideration of the further sum of \$50 appellant agreed and undertook to keep the car in which the strawberries were loaded sufficiently iced to keep it at a temperature sufficiently cold to preserve and keep said strawberries in a merchantable condition so that they would be marketable in Kansas City, Mo. Appellees then allege that the strawberries would have netted them, after paying all expenses for transportation, icing, and commissions for selling, the sum of \$1,158.89, if same had reached Kansas City in merchantable con-

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\*See foot-notes appended to St. Louis, etc., Ry. Co. *v.* Marshall (Ark.), 16 R. R. R. 38, 39 Am. & Eng. R. Cas., N. S., 38.

†See foot-notes appended to Illinois Cent. R. Co. *v.* Stevens (Ky.), 21 R. R. R. 477, 44 Am. & Eng. R. Cas., N. S., 477.

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dition. Appellees allege that appellant neglected, failed, and refused to keep said car iced as it agreed to do, and that by reason of its failure the strawberries became overheated in the car, and thereby became soft, mushy, mouldy, and unmarketable in Kansas City, Mo.; that they netted appellees \$369.35 in their unsalable condition, and that appellees were damaged by reason of the negligence and carelessness as aforesaid \$789, for which sum they asked judgment.

Appellant denied all the material allegations of the complaint, and set up the defense of contributory negligence in shipping berries unfit for shipment, and in not discovering defective condition of car in respect to drain pipes if it was defective, and in not diligently placing berries on market after their arrival at Kansas City. The defense of contributory negligence, however, is not urged here. The bill of lading evidencing the contract of shipment was attached to the complaint as an exhibit. It contained the following: "And it is further especially understood that, for all loss or damage occurring in the transit of said property, the legal remedy shall be against the particular carrier only in whose custody the said property may actually be at the time of the happening thereof—it being understood that the St. Louis, Iron Mountain & Southern Railway Company's leased, operated and independent lines, in receiving the said property to be forwarded as aforesaid, assumes no other responsibility for its safety or safe carriage than may be incurred on its own road." The bill of lading also recited that the strawberries were received to be forwarded to Kansas City, Mo. Across the face of the bill of lading were written the words and figures: "Refrigerator \$50.00." The bill of lading was issued to T. H. Renfroe, one of the appellees, at Alma, Ark., by the agent of appellant.

Appellee adduced evidence tending to prove that on the 27th of April, 1905, an American Refrigerator Transit car on appellant's road at Alma, Ark., was loaded with strawberries for Renfroe, the shipper, who sold same to the other appellees, Jones and Taylor, while in transit. The strawberries were in good, merchantable condition when loaded, and were properly loaded. It was a hot day when the car was loaded. The car left Alma a little before sundown on the 27th of April. It had remained at Alma from about 3:30 o'clock p. m. the day previous. The car was sealed under the directions of appellant's agent at Alma. While the berries were being loaded it was noticed that the water was running out of the corners of the car. Witnesses testified that the water was passing out of the car all the afternoon; that it ran out in a stream; that the car was not cold on the inside. It was shown that the car left Alma at 6:23 o'clock p. m., and arrived at Van Buren 7:06 p. m., and left Van Buren at 11:20 p. m. for Kansas City on April 27, 1905. The car was re-iced at Van Buren, but not until it had stood for nearly three hours. When the car was inspected at Kansas City at about 6 p. m., April 28, 1905, the interior was found to be extremely warm. The berries were soft and beginning to mould; none of them

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were in merchantable condition. The temperature in the car was about 65 to 75 degrees. If the car had been kept well iced all the time, the berries would have arrived in Kansas City in good condition.

James A. Shibley, a witness for the appellant, testified that he was working for the American Refrigerator Transit Company; that he had no connection with the Iron Mountain Railway Company; that the icing of the American Refrigerator Transit Company's cars was a duty which devolved upon the American Refrigerator Transit Company; that he superintended the icing of the car complained of in this suit; that the car was iced before it left Van Buren to be loaded at Alma, and that, after being loaded at Alma, it was returned to Van Buren and re-iced at that point before starting on its journey northward; that he examined the car and found it in good condition; that the bills for icing were rendered to the American Refrigerator Transit Company, whose duty it was to attend to the icing of the car and to turning it over to the railway company for use; that he made his reports formally to the general office of the American Refrigerator Transit Company at Tyler, Tex.; that when strawberries are loaded into a refrigerator car they have the effect at first of running up the temperature of the car, that, when a refrigerator car is in proper condition and berries are being loaded into the car and the temperature runs up, ice will melt rapidly and will run out through the flow pipes at the corners of the car.

The appellant, at the close of the evidence, asked the court to direct a verdict in its favor, which request the court refused. Appellant then asked the court to instruct the jury as follows: (1) "You are instructed that the defendant assumed no authority to keep the berries iced and in good cars north of Coffeyville, Kan. (2) You are instructed that, if the defendant delivered to a connecting carrier the car of strawberries, the defendant meanwhile having used reasonable care to move the berries promptly and to preserve them, and the connecting carrier received the berries for shipment, then the same duty rested upon the connecting carrier to move the fruit and re-ice it as originally rested upon the original carrier, and if the connecting carrier failed to ice such car, and the result was the damage of the fruit and the plaintiffs were injured, then the plaintiffs cannot recover." All these requests were refused, and appellant duly excepted.

The court, on its own motion, gave several instructions, and in substance told the jury that it was the duty of appellant to furnish suitable cars for the shipment of the berries, and that if the weather conditions required that the cars should be iced in order to preserve the berries during the shipment, then it was the duty of appellant to furnish cars capable of being iced, and to exercise reasonable care to ice the car so as to preserve the berries from decay. If appellant failed to comply with its duty, and appellees were damaged as the proximate result of such failure, appellant was liable. But if appellant performed its duty, and a connecting carrier failed to discharge its duty, and that damage

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resulted from the failure of the connecting carrier, and not from the failure of the appellant as initial carrier to discharge its duty as defined by the court, then appellant was not liable.

Appellant does not urge objection to any particular instruction given by the court on its own motion, but contends that the instructions given as a whole presented the case to the jury on an erroneous theory.

The verdict and judgment were for \$559.50. All exceptions reserved at the trial are preserved in assignments of error in motion for new trial, which was overruled, and this appeal followed.

*Oscar L. Miles*, for appellant.

*Sam. R. Chew*, for appellee.

WOOD, J. (after stating the facts). The contract of shipment, as evidenced by the bill of lading, was entered into between appellant and appellee. It was for through shipment over appellant's line and connecting carriers, from Alma, Ark., to Kansas City, Mo. Appellant having accepted the berries for through transportation, it was its duty to furnish cars suitable for the purpose. Strawberries were perishable goods, and, appellant having undertaken to transport them to market, it was its duty to furnish cars especially adapted to the preservation of such goods during the time required for their transition from the place of shipment to the place of destination under the contract. "If," says Mr. Hutchinson, "the goods are of such a nature as to require for their protection some other kind of car than that required for ordinary goods, and cars adapted to the necessity are known and in customary use by carriers, it is the duty of the carrier where he accepts the goods to provide such cars for their carriage." Hutch. Car. (3d Ed., Mathews v. Dickinson) §§ 505, 508; Beard v. Railway, 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; Chicago R. Co. v. Davis, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143; St. L., I. M. & So. Ry. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802.

It is the contention of appellant that it discharged its duty to appellees when it furnished a refrigerator car, and that the duty of icing the car, under the evidence, devolved upon the American Refrigerator Transit Company, the owner of the car. The contention is unsound, as shown in New York, Philadelphia & Norfolk R. R. Co. v. E. F. Cromwell, 35 S. E. 444, 98 Va. 227, 49 L. R. A. 462, 81 Am. St. Rep. 722. That was a case involving the transportation of strawberries. The court said: "The California Fruit Transportation Company, for a consideration, furnished its cars to the plaintiff in error (the railway company). These cars were agencies or means employed by the plaintiff in error for carrying on its business and performing its duty to the public as a common carrier, one of which was to provide suitable cars for the safe and expeditious carriage and preservation of the freight it undertook to carry. A railway company cannot escape responsibility for its failure to provide cars reasonably fit for the conveyance of

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the particular class of goods it undertakes to carry by alleging that the cars used for the purposes of its own transit were the property of another. The undertaking of the plaintiff in error (railway company) was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which it was carried were owned by the California Fruit Transportation Company, or that such company undertook to ice said cars or to pay for the ice. As between the plaintiff in error and defendant in error, the California Fruit Transportation Company and its employees were the agents of the plaintiff in error. So far as the defendant in error was concerned, the plaintiff in error was under the same obligations to care for the fruit that it would have been had the refrigerator cars belonged to it."

It matters not in the case at bar that the refrigerator car belonged to the American Refrigerator Transit Company, an independent contractor. Appellees had no contract with it to furnish cars, or to ice them when furnished. Their contract was with appellant to furnish suitable cars; and the evidence was ample to support the verdict that appellant not only undertook to furnish the car, but also to ice the same. Even if the law did not impose this upon appellant as a duty, the proof shows that it undertook, for a valuable consideration, to furnish refrigeration as well as the car. The sum of \$50 was charged and paid for that service to appellant. The evidence was sufficient to warrant the jury in finding that appellant negligently failed to perform this service, that it failed to carry out its contract to ice the car, and thus to furnish a suitable car.

True, in the case of connecting carriers, the presumption is that the delivering carrier caused the injury. *Ry. v. Embrey*, 76 Ark. 589, 90 S. W. 15; *Ry. v. Marshall*, *supra*; *Ry. v. Coolidge*, 73 Ark. 114, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21; *Ry. v. Birdwell*, 72 Ark. 502, 82 S. W. 835. But this presumption only obtains in the absence of proof locating the negligent carrier. Here the evidence warranted the jury in finding that appellant was negligent in failing to use ordinary care to see that the car was kept properly iced at Van Buren before it started for Kansas City.

Finding no error, the judgment is affirmed.



FLEISCHMAN, MORRIS & Co. *v.* SOUTHERN RY.

(Supreme Court of South Carolina, March 8, 1907.)

[56 S. E. Rep. 974.]

**Carriers—Baggage—Loss.\***—Where a carrier has some notice of the contents of trunks containing samples of merchandise, he is liable to the same extent as for personal baggage.

**Evidence—Judicial Notice.†**—The courts will take judicial notice of a general custom among carriers of transporting sample trunks as personal baggage.

**Appeal—Review.**—The Supreme Court will not consider the constitutionality of a statute, where the question was not raised below.

**Carriers—Baggage—Sample Trunks.‡**—Where a carrier voluntarily receives trunks containing samples an unreasonable time before the owner intended to take passage, it is liable for their loss as a warehouseman.

**Same—Evidence of Loss.§**—Where a passenger shows delivery of his baggage to a carrier and the carrier's failure to deliver the same, he makes out a prima facie case, and the burden is on the carrier to show that it has not converted the property.

Appeal from Common Pleas Circuit Court of Richland County; Klugh, Judge.

Action by Fleischman, Morris & Co. against the Southern Railway. Judgment for plaintiffs. Defendant appeals. Affirmed.

*E. M. Thompson*, for appellant.

*D. W. Robinson*, for respondents.

WOODS, J. This is an action for the recovery of the value of two trunks of sample shoes destroyed by fire in the station of the defendant at Jonesville, S. C. The plaintiffs recovered judg-

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\*For the authorities in this series on the question, what constitutes baggage for which a carrier of passengers is liable, see foot-notes appended to *Withey v. Pere Marquette R. Co.* (Mich.), 21 R. R. R. 740, 44 Am. & Eng. R. Cas., N. S., 740; foot-notes appended to *Charlotte Trouser Co. v. Seaboard A. L. Ry.* (N. Car.), 21 R. R. R. 459, 44 Am. & Eng. R. Cas., N. S., 459; foot-notes appended to *Dahrooge v. Pere Marquette R. Co.* (Mich.), 20 R. R. R. 637, 43 Am. & Eng. R. Cas., N. S., 637.

†For the authorities in this series on the subject of judicial notice of matters relating to railroads, see foot-notes appended to *Southern Ry. Co. v. Blanford's Adm'x* (Va.), 21 R. R. R. 646, 44 Am. & Eng. R. Cas., N. S., 646.

‡See extensive note, 2 Am. & Eng. R. Cas., N. S., xxxii, et seq.; foot-notes appended to *Hicks v. Wabash R. Co.* (Iowa), 21 R. R. R. 178, 44 Am. & Eng. R. Cas., N. S., 178.

§See foot-note appended to *Lehman, Stern & Co. v. Morgan's Louisiana, etc., Co.* (La.), 18 R. R. R. 559, 41 Am. & Eng. R. Cas., N. S., 559.

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ment, and the defendant appeals, alleging error in the refusal to order a nonsuit and in the charge to the jury.

As no evidence was offered on the part of the defendant, the case is to be considered in view of the facts testified to by the plaintiffs' witnesses: C. C. Cooper, a traveling salesman for plaintiffs, who had been in the country selling shoes, on coming into Jonesville in the afternoon, carried his two trunks in a private conveyance to defendant's station and took the trunks out. When he moved one trunk to the end of the station, and was in the act of moving the other to the same place, intending to leave them there, a negro porter came out of the station, and said, "Boss, we always lock the trunks up that are left here," and then rolled the trunks in. The evidence tended to show the station agent of the defendant observed the act of the porter and made no objection. Cooper, the salesman, intended to leave Jonesville the next morning on one of defendant's trains, taking the trunks with him, but was uncertain whether he would go towards Asheville or Columbia. His intention with respect to the trunks was not communicated to the agent. They were destroyed about 3 o'clock the next morning by a fire which burned the station. No evidence was offered as to the origin of the fire. The trunks were not represented to contain personal baggage; but, on the contrary, there was evidence tending to show notice to the agent of the character of the contents when he allowed them to be placed in the station. The size of the trunks, four feet long and three feet high, indicated they would not be carried by a traveler to contain his personal belongings going through the country in a private vehicle. The salesman, Cooper, testified: "Q. What sort of trunks were they? What was the size of the trunks? A. If there is any member of the jury who has ever seen a salesman's shoe trunk, he knows. I do not know what the trunks are made of." The motion for nonsuit, made on the ground that no other inference could be drawn from the evidence than that the defendant was a mere gratuitous bailee, and therefore not liable in the absence of proof of gross negligence, was properly refused; for, as will appear in the consideration of the exceptions to the charge, the question whether the defendant held the trunks as a common carrier or a warehouseman at the time of the fire was a question of fact for the jury.

The defendant's first request to charge raises the question of the degree of liability of common carriers for trunks of samples taken by traveling salesmen with them for use in their business, without special notice to the carrier that they contain samples of merchandise. The request which the circuit judge refused was: "If the jury find from the testimony, if such testimony there be, that the trunks alleged to have been delivered to the defendant contained merchandise packed as baggage, then I charge you that the defendant could not be held responsible or liable for the loss or injury to the merchandise, except as a gratuitous bailee, unless its agent having control of the receipt of the baggage was informed or knew what was contained in the trunks." The cases

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in which the matter has been under review are cited in 6 Cyc. 668: *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587; *Trimble v. New York Cent. & Hudson R. R. Co.*, 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; *New Orleans & N. E. R. Co. v. Shackelford*, 87 Miss. 610, 40 South. 427, 4 L. R. A. (N. S.) 1035; *Kansas City, M. & B. R. Co. v. Higdon*, 94 Ala. 286, 10 South. 282, 14 L. R. A. 515, 33 Am. St. Rep 119—and it will be found the proposition contained in the request has the sanction of many courts of high authority. Nevertheless we are unable to adopt it, because, as we shall endeavor to show, it leaves out of view a custom of business adopted by the railroads, now firmly established, which courts cannot refuse to recognize. Indeed, as has been remarked by another, the law as to the relation of carriers to trunks of samples carried by traveling salesmen is in a state of evolution, and we therefore feel free to adopt our own view untrammelled by the conclusions of other tribunals.

It is true as a general proposition, a common carrier is not liable for merchandise, as distinguished from personal baggage, which a passenger undertakes to carry as if it were personal baggage without the consent of the carrier; and it may be this rule should be held to apply even when the agent agrees to receive the merchandise as baggage, if the traveler knows in doing so he is violating a rule of the company. *Weber Co. v. Railway Co.*, 84 N. W. 1043, 113 Iowa, 188. Personal baggage is not carried free. The charge for carrying it is estimated, and included in the price of the ticket. The reason of the general rule that a traveler cannot take merchandise as baggage and hold the carrier liable is that the cost of carrying merchandise is not included in the passage money; and to allow it to be carried as baggage, and make the carrier liable for it as such, would be to sanction a fraud on the carrier in depriving it of its legitimate freight charges. But railroad companies themselves have chosen to modify this rule, for the advancement of their own business, by carrying the sample trunks of traveling salesmen as baggage, charging for the excess, when it, with personal baggage, is over a certain weight.

It is true there was no proof in this case of the custom, but the court will take judicial notice of it. Courts do not require proof of the established business customs of the people whose affairs come before them; for, as has been well said, courts will not profess to be more ignorant than the rest of mankind. This custom of carriers as to salesmen's trunks of samples is as universal and as well known as the custom of checking ordinary baggage, and it would be as absurd for courts to require proof of one as of the other. It does not seem material how such trunks with their contents are designated—whether as baggage or freight. The vital fact is that the railroads, with full knowledge of their character, receive them for transportation, carry them with the passenger on their passenger trains, and undertake to deliver them at his destination. In doing so the carriers themselves place sample trunks on the same footing as baggage, and

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as to such trunks and their contents they must be held to the same liability. The General Assembly recognized this course of railroads in treating salesmen's sample of merchandise on the same footing as personal baggage in the act of February, 1904 (24 St. at Large, p. 379), which provides "that on and after the approval of this act by the Governor, all common carriers of passengers in this state using steam as a motive power shall safely transport to the destination of any passenger personal baggage or sample trunks or sample cases, not to exceed two hundred pounds in weight, for any one passenger holding a ticket or paying ordinary passenger fare, free of charge for such personal baggage, sample trunks or sample cases, and shall issue checks for such personal baggage or sample trunks or sample cases on requests." We do not discuss the question of the right of railroad companies to make this discrimination in favor of salesmen's sample trunks, because that question could be made only by one who claimed to be discriminated against, and not by the railroad company. As we have endeavored to show, the plaintiffs' case does not depend upon the statute above cited. Its constitutionality was not drawn in question in the circuit court; hence any expression of opinion on that subject, though suggested by appellant's exceptions and argument, would be gratuitous.

In opposition to this view of liability for sample trunks, it is said great hardship would result, in that the railroad companies might be held responsible for samples of jewelry and other articles of enormous value. The answer is that this, like all other rules of law, is to be applied with the limitations required by common sense. A reasonable amount of jewelry, such as is ordinarily worn by persons in the same station of life as the passenger, is held to be included in personal baggage; but this does not mean that jewelry or other valuables worth thousands of dollars could be carried by one of immense wealth as ordinary baggage at the risk of the carrier, without notice to it, on the ground that such articles are worn and used as personal belongings by those of like station as the passenger. In such extraordinary cases the risk is out of all proportion to the average of compensation included in the ticket, and the carrier will not be charged with the intention to assume it. So, also, the carrier may be held to assume liability for trunks containing samples of ordinary merchandise, such as shoes, hats, dry goods, groceries, etc., carried with the passenger, on the ground that the carrier has voluntarily chosen to regard the transportation of such packages compensated for by the traveler's ticket, or to allow it to be paid for as excess baggage; the excess being counted by weight. But it by no means follows from this that the carrier is to be held liable for articles of extraordinary value used as salesmen's samples, the carriage of which all reasonable men know is attended by risk of enormous loss, suggesting the exercise of unusual care. The main element entering into the charge of transportation in such cases is, not weight or bulk, but value; and the owner or his agent having the property in custody

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must be charged with knowledge that the carrier would not agree to transport it and assume the risk on the basis of weight, and consequently the owner or agent must in the exercise of good faith give notice of the contents before placing it in the carrier's custody. In this view we think the case of *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587, and other like cases, are consistent in result with the rule we have laid down. We lay no stress on the cases of *Harzburg v. Railway Co.*, 65 S. C. 539, 44 S. E. 75, and *Sonneborn & Co. v. Railway*, 65 S. C. 502, 44 S. E. 77, where recovery was had for damage to the contents of a salesman's trunks checked as baggage, because the point here involved was not made in these cases.

For these reasons, we think the first request of the defendant was properly refused, and the second, third, and fourth exceptions should be overruled.

The defendant next submits the circuit judge erred in refusing to charge the jury the following request: "If the jury, from the testimony, if such testimony there be, find that the trunks mentioned in the complaint were received by the defendant at its depot or station, not for immediate transportation, but to be stored without charge for the accommodation or convenience of an intending passenger on some later train, and while so held the trunks were destroyed by fire, then the defendant would not be liable unless the fire was caused by gross negligence on the part of the defendant, and the burden of proving such negligence would be on the plaintiff." In *Battle v. Railway Co.*, 70 S. C. 342, 49 S. E. 849, it was held to be a question for the jury to determine whether the trunk had been delivered to a railroad company and accepted by it as baggage; but in that case the difference between the liability of a warehouseman and a common carrier did not arise. A traveler has the right to deliver his baggage a reasonable time before the departure of the train he expects to take, and hold the railway liable as a common carrier from such delivery. *Hickox v. Railway Co.*, 31 Conn. 281, 83 Am. Dec. 143, and note; *Wood v. Railway Co.*, 99 Am. St. Rep. 372, note; *Goldberg v. Ahnapee & Western Ry. Co.*, 105 Wis. 1, 80 N. W. 920, 47 L. R. A. 221, 76 Am. St. Rep. 899, and note. But the manifestly just rule is held by unbroken authority to be that a railroad company does not assume the liability of a common carrier, but only that of a warehouseman for baggage received by it for an intended passenger for his own convenience and accommodation at an unreasonable time before the departure of his train. What is an unreasonable time is usually a question of fact for the jury, and no request was made for an instruction on this point.

But, assuming the time from the afternoon until the intended departure the next morning was an unreasonable time, the defendant would still hold the trunk as a warehouseman and be charged with ordinary care. The theory upon which this request and the motion for a nonsuit were based is that in such circumstances the railroad company is only a gratuitous bailee



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and chargeable only for gross negligence. But in such circumstances, when trunks are voluntarily received from an intending passenger, and no objection is made to their retention until his departure on the train, as was the case here, we think both reason and authority will hold the railroad company as a warehouseman to ordinary care. 6 Cyc. 670, and authorities; Denver, etc., R. Co. v. Peterson, 97 Am. St. Rep. 102, note; Murray v. International Steamship Co., 64 Am. St. Rep. 29, note; Rossier v. Railway Co., 91 S. W. 1018, 115 Mo. App. 515. The request was, therefore, properly refused. As we have endeavored to show, the defendant held the trunks either as a common carrier or as a warehouseman, and even as a warehouseman was held to ordinary care. The law insisted on by the defendant as to the care required of a gratuitous bailee was, therefore, inapplicable.

There was no request to charge as to the duty of a warehouseman to observe only ordinary care. The motion for a nonsuit was made, however, not only on the ground of failure to prove gross negligence, but failure to prove any negligence. Even if the proof admitted no other inference than that the defendant as to these trunks was not a carrier, but a warehouseman, and therefore chargeable with ordinary care, there was not such a total failure on the part of the plaintiff to make out a case as would have justified a nonsuit. The plaintiffs proved the destruction by fire of the station in which the trunks had been left; and Cooper, the plaintiff's agent, testified that when he got to the fire "the depot was fastened. The doors to the waiting room were fastened. I went to the door to get the trunks out, and, had it not been locked, I could have gotten them out."

The proof being that the goods were destroyed by fire, and not converted, we come to the question of the burden of proof as to negligence or due care in an action by the owner of the property against the warehouseman having it in charge. Courts of last resort in this county have either expressly followed or have been influenced by the great authority of Judge Story, who thus states the rule which he rests on the early English cases: "The question may here arise, as in many other cases of bailment, on whom lies the burden of proof of negligence, or of repelling it. With certain exceptions, which will hereafter be taken notice of, as to innkeepers and common carriers, it would seem that the burden of proof of negligence is on the bailor; and the proof merely of the loss is not sufficient to put the bailee on his defense." Story on Bailments, § 410. After a review of many cases, Mr. Freeman says, in the note to Schmidt v. Bland, 24 Am. Dec. 153: "The doctrine deducible from these authorities seems to be this: A bailor, seeking to recover from a warehouseman for the nondelivery of goods or an injury thereto, must prove negligence. When he shows that the goods were not delivered on demand, or were delivered in a damaged condition, he has made a *prima facie* case. If the defendant accounts for the nondelivery or injury by showing that the goods were stolen, or were lost or damaged by fire, or in any other manner consistent



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with the exercise of ordinary care on his part, the plaintiff's prima facie case is overcome, and he must prove positive negligence occasioning the loss."

It would needlessly lengthen this opinion to attempt a criticism of the numerous cases. They will be found collated in Hale on Bailments, §§ 30, 140, and in other text-books, and in annotated cases on the subject. Examination of the authorities will disclose expressions of doubt and dissatisfaction concerning the rule that, as soon as the bailee proves loss or injury by fire or other means, the burden then rests on the bailee to prove negligence. The course of the decisions in New York will serve to illustrate the unsatisfactory state of the law in this country. In *Platt v. Hibbard*, 7 Cow. (N. Y.) 497, Judge Walworth, on the circuit, laid down the rule that, where property intrusted to a warehouseman "is lost, injured, or destroyed, the weight of proof was with the bailee to show a want of fault or negligence on his part." Subsequently, in *Clark v. Spence*, 10 Watts (Pa.) 335, the rule was held to be established by authority that the bailee discharged himself by proof of loss and the manner of loss, unless the bailor should prove negligence in allowing the loss to occur. The court clearly indicated it followed this rule only because compelled by authority, and expressed regret that the rule laid down in *Platt v. Hibbard* was not the law. In the much later case of *Wintringham v. Hayes*, 38 N. E. 999, 144 N. Y. 1, 43 Am. St. Rep. 725, the court says: "While it is true, as a general proposition, that a bailor, charging negligence on the part of the bailee, rests under the burden of proof, yet oftentimes slight evidence will shift the burden to the bailee. In an action against a bailee for loss or damage to goods by accident, proof of nature of the accident may afford prima facie proof of negligence. *Russell Mfg. Co. v. Steamboat Co.*, 50 N. Y. 121. In the case at bar, if the defendant, in support of his counterclaim, is able to prove the condition of the yacht when delivered to plaintiff, the nature of the subsequent injuries she sustained, and that they were not the result of ordinary wear and tear, he will have made out a prima facie case, and the burden of proof will be shifted to the plaintiff, who, as bailee, had the yacht exclusively within his control, and should be able to show the manner in which he discharged his contract obligations in the premises." The conflict of authority and the unsatisfactory state of the law elsewhere is alluded to only to make it clear that the rule established in this state by *Wardlaw v. Railway Co.*, 11 Rich. Law 337, and followed in *Brunson & Boatwright v. Railway Co.* (S. C.) 56 S. E. 538, is not opposed to any well-defined or straight-flowing current of judicial thought in this country.

The rule in this state, as indicated by the cases above referred to, is that the bailor must prove delivery to the bailee and his refusal to return as required by the contract of bailment. The burden is then on the bailor to prove that he has not converted the property, and this he may do by showing its loss and the manner of its loss; but by the manner of loss is meant, not only

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the isolated fact of destruction by fire, or loss by theft or otherwise, but the circumstances connected with the origin of the fire or other cause of loss or injury as far as known to the bailee, and the precautions taken to prevent the loss or injury. From these facts, coupled with any testimony on the subject the bailor may introduce, it is for the jury to say whether the bailee was negligent. This rule is entirely reasonable. The facts surrounding the loss, particularly the precautions taken against it, are usually known to the bailee or ascertainable by him. On the other hand, the owner of the property cannot be supposed to know the details of a warehouseman's business, for he is often hundreds of miles away. With the great modern development of the warehouse business, we venture to think the injustice of the rule which exempts a warehouseman from responsibility to the owner on the bald proof of loss or injury to the goods by fire, by theft, or otherwise, will become more and more apparent. In most cases, to require the owner to assume the burden of showing that the fire or theft was due to the lack of ordinary care is to impose an impossible task and place him more than ever at the mercy of the warehouseman. We are satisfied, therefore, to adhere to the somewhat exceptionable rule laid down in this state, notwithstanding the great number of opposing authorities in other jurisdictions.

It is the judgment of this court that the judgment of the circuit court be affirmed.

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**McCOLLUM v. SOUTHERN PAC. CO.**

(Supreme Court of Utah, Jan. 25, 1907.)

[88 Pac. Rep. 663.]

**Evidence—Best and Secondary—Railroad Tickets.**—Plaintiff, in an action against a railway company for injuries caused by its failure to provide him with proper accommodations and protection as a passenger, could introduce oral evidence to show the class of his ticket, where he had surrendered it to the railway and had served proper notice on the same to produce it.

**Same.**—Rev. St. 1898, § 3410, providing that there can be no evidence of the contents of a writing, other than the writing itself, except when the original is in the possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice, contemplates a railway ticket as such writing.

**Same.**—The rule that where the cause of action is founded upon an alleged writing, and both the execution and contents of the writing are denied, and the alleged writing is shown to be in the possession of a person residing outside the state, secondary evidence of its contents is not admissible unless proper effort is made to obtain the original, does not apply where the cause of action is not based upon a written contract, but is for tort.

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**Carriers—Tickets—Nature and Effect.\***—In the absence of evidence to the contrary, railroad tickets are not deemed to be contracts in writing, and no presumption arises, from the purchase of a ticket, that the ordinary duties of a carrier imposed by law are modified in the ticket.

**Same.†**—Where through tickets are in the form of coupons, each coupon is to be regarded as a distinct ticket for each road, sold by the first company as agents for the other companies.

**Same—Personal Injuries—Contributory Negligence—Question for Jury.‡**—In an action for injuries to a passenger resulting from the failure to provide him proper accommodation and protection, evidence examined, and held insufficient to show, as a matter of law, that plaintiff was negligent.

Appeal from District Court, Third District; T. D. Lewis, Judge.

Action by J. A. McCollum against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*R. L. Williams, Geo. H. Smith, and J. G. Willis*, for appellant.  
*W. R. White and Powers & Marioneaux*, for respondent.

FRICK, J. Plaintiff (who will hereafter be styled "respondent") brought this action to recover damages against the defendant (hereafter called "appellant") for personal injuries alleged to have been sustained by respondent while a passenger on one of the passenger trains of appellant, arising out of the alleged negligence set forth in the complaint. In view that there is no question in this court respecting either the form or substance of the complaint, it need be set forth no further than to make clear the questions hereinafter discussed. The allegations deemed material for that purpose are, in substance: That respondent, on the 7th day of April, 1903, purchased from the St. Louis, Iron Mountain & Southern Railway Company a first-class passenger ticket, good for passage over said road and over other connecting

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\*For the authorities in this series on the question whether mere acceptance of a passenger ticket includes assent to its printed conditions, see foot-notes appended to *Freeman v. Atchison, etc., Ry. Co.* (Kan.), 18 R. R. R. 607, 41 Am. & Eng. R. Cas., N. S., 607; *Hutchins v. Pennsylvania R. Co.* (N. Y.), 17 R. R. R. 685, 40 Am. & Eng. R. Cas., N. S., 685; foot-notes appended to *Dagnall v. Southern Ry. Co.* (S. Car.), 15 R. R. R. 59, 38 Am. & Eng. R. Cas., N. S., 59.

†See foot-notes appended to *Lehigh Valley R. Co. v. Dupont* (C. A.), 12 R. R. R. 83, 35 Am. & Eng. R. Cas., N. S., 83; foot-notes appended to *Pennsylvania Co. v. Loftis* (Ohio), 15 R. R. R. 850, 38 Am. & Eng. R. Cas., N. S., 850.

‡For the authorities in this series on the subject of a carrier of passengers' duties and liabilities with respect to vehicles, see foot-notes appended to *Traphagen v. Erie R. Co.* (N. J.), 22 R. R. R. 242, 45 Am. & Eng. R. Cas., N. S., 242.

For the authorities in this series on the subject of the duty of the carrier to protect its passengers against others, see foot-notes appended to *Norfolk & W. Ry. Co. v. Birchfield* (Va.), 21 R. R. R. 305, 44 Am. & Eng. R. Cas., N. S., 305; foot-notes appended to *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 20 R. R. R. 782, 43 Am. & Eng. R. Cas., N. S., 782.

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lines, including that of appellant, through Missouri, Texas, Arizona, and California to San Francisco, and from thence over appellant's railroad back to Ogden, Utah, and from thence back home to Fisk, Mo., where the ticket was purchased. The respondent then sets forth the duties assumed by appellant as a carrier of passengers, which, being merely the duties imposed by law, may be treated as surplusage and need not be set forth here. The complaint then proceeds further: That on or about April 16, 1903, respondent boarded a regular passenger train of appellant at San Francisco, Cal., on his return home through California, Nevada, and Utah, to Ogden, Utah; that appellant placed respondent in a passenger car, No. 1,558, which was a car used for second-class passengers; that respondent many times during the journey to Ogden, Utah, demanded of the conductor in charge of the train to be placed on a better car, which said conductor neglected and refused to do; that in said car, during all of said trip from Reno to Ogden, there were several second-class male passengers who drank intoxicating liquors and became drunk, and continuously used obscene, boisterous, and profane, and threatening language and actions toward respondent and other first-class passengers during said journey; that said car was extremely filthy during all of said journey, and was cold and without heat or drinking water for the use of the passengers; that respondent and other first-class passengers notified, requested, and demanded of appellant's conductors and agents that they remove and quiet said second-class passengers; that they provide another better and first-class car for the respondent and other first-class passengers, and that they provide heat and water in said car, but all of said conductors who had charge of said car neglected and refused to comply with the repeated requests and demands of respondent to either remove or quiet said second-class passengers, or to provide a better car, with heat and water, for respondent and the other first-class passengers; that by reason of the coldness of said car, and the want of water, and of said filth, smoke, obscene and profane language, and threatening actions, respondent was unable to sleep or rest during the night, was made sick at the time and for some time thereafter, was frightened by the boisterous and threatening language and actions, and was humiliated and insulted by the great indignities received, owing to the conduct of said second-class passengers, and was shocked in his feelings and suffered great mental distress, to his damage, etc. Appellant answered, denying generally all the allegations of the complaint, except as to its corporate capacity, and that it owned and operated a railroad between San Francisco, Cal., and Ogden, Utah. Upon these issues a trial was had to a jury, at which respondent produced evidence which tended to sustain all of the allegations of his complaint. The appellant produced no evidence. The case being submitted to the jury upon instructions, they returned a verdict for respondent, upon which the court entered judgment, from which this appeal is taken.

Such of the testimony as will be necessary to illustrate the

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matters discussed in this opinion will hereafter be set forth. While appellant assigned numerous errors in the abstract, all were abandoned except two, which are stated in the brief of appellant, by its counsel, as follows: "The appellant relies, for reversal, upon the errors committed by the trial court in permitting plaintiff to testify to the contents of the written contract in question, and also upon the fact that plaintiff's testimony conclusively shows him to have voluntarily remained in the car under the conditions complained of, without effort on his part to have relieved himself therefrom, and by reason of his conduct he alone was responsible for any damage which may have resulted to him therefrom." We will consider the alleged errors in the order as above stated.

The first error is based upon the following proceeding occurring during the trial: The respondent had testified that he purchased a ticket at Fisk, Mo., on the 7th day, of April, 1903, and that he paid therefor the sum of \$102; that he did not have the ticket in his possession; that the same was a coupon ticket, the several coupons of which had been taken up by the different conductors of the railroads traveled over by him; that he left San Francisco on or about April 14th, on his return home to Fisk, Mo., and that for that purpose he boarded a train of appellant at Oakland, Cal.; and that the conductors of appellant had taken up the portions of his ticket between San Francisco, Cal., and Ogden, Utah. Upon this testimony counsel for respondent stated in open court that a notice to produce the ticket had been served on appellant's counsel (which notice and service thereof appears in the record in this case), and asked them if they had produced the ticket, to which they responded that they had not, and after respondent further testified that the last portion of the ticket was taken up outside of the state of Utah, to wit, in the state of Missouri, counsel for respondent asked him the following question: "Q. State whether or not that was a first-class ticket." To this question counsel for appellant objected that "it is incompetent, and, furthermore, the ticket is in writing." The court then stated that it appeared that the ticket, if in writing and was outside of the state of Utah, that a part thereof had been surrendered to appellant, and that notice to produce it had been served on it. To this counsel for appellant responded: "Our objection goes to the contract, however, not to any part they have surrendered to us. A demand was made on us for the entire ticket, including the part just testified to, which is shown not to have been in the possession of the defendant at any time." The objection was overruled, and the respondent answered: "Yes, sir; it was." So as to make our views clear, we will add here that, after answering the foregoing question, respondent further testified that at the time he boarded the train at Oakland, Cal., he was requested to show his ticket before entering the car; that he did so, and that he was directed by an official who seemed to be in charge to go into the car in question; that on several occasions during the journey between Reno, Nev., and Ogden, Utah, covering a



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period of about 24 hours, he had called the attention of the conductors to the conduct of the objectionable passengers, and the filthy and cold condition of the car, to the lack of heat and water therein, and that he was not receiving the treatment that a first-class ticket entitled him to; and that the conductor finally told him that he (the conductor) could do no better in the way of accommodations for respondent. Respondent describes the car as an ordinary day coach, with the usual plush seats. The question, therefore, is, did the court err in permitting the foregoing question to be answered, in view of the nature of the case and the state of the whole record?

Counsel rely upon section 3410, Rev. St. 1898, which, so far as material, reads as follows: "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases: \* \* \* When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice." Counsel contend that in this case the evidence had disclosed, at the time of the objection, that what they term the "contract portion" of the ticket was not surrendered to appellant, but was surrendered to another carrier in the state of Missouri, and that for that reason the case does not come within the exception of the statute above quoted. Is this contention sound? We think not. Counsel's contention is, we think, too narrow, in view of the nature of the case and the character of passengers' tickets as evidence in such cases. In the first place, there was nothing in the evidence, when the objection was made, to disclose what the nature of the ticket was; there was nothing that apprised the court that it did or did not embody a special contract; nor is there anything in the pleadings to show this. As a matter of law railroad tickets, as a general rule, do not necessarily cover the duties arising out of the relation of carrier and passenger. Thompson, in his *Commentaries on the Law of Negligence* (volume 3, § 2581), speaking of the nature of railway passage tickets, says: "An ordinary passage ticket is not a written contract, though it may be so drawn and signed as to become such, as where it embodies in explicit terms an undertaking which the carrier assumes toward the person named therein. Excluding tickets of this kind, it is to be observed that a passage ticket is a mere token or voucher furnished by the carrier to the passenger upon the payment by him of fare."

The nature of railway tickets, as shown by the authorities, is well and clearly crystallized in the following statement by Mr. Justice Wilkes of the Tennessee Supreme Court, in the case of *Watson v. Louisville & N. R. Co.*, reported in 56 S. W., at page 1026, and 49 L. R. A., where, at page 456, he says: "It was held in that case [referring to another case] that a sale of a railroad ticket at the usual full fare, and not for a special occasion, entitled the purchaser to a full and unlimited right of passage, and that a mere printing of conditions upon the face or back of such ticket, attempting to limit this right,



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would not have that effect, and would not carry notice to the passenger of the condition and requirement, unless his attention was called to it, or it was shown to him and assented to by him. This holding was based upon the theory that when a passenger purchased a ticket for transportation from one point to another over the road of a public carrier, and pays full or regular fare, the ticket is not intended as a contract in itself, but is a mere token, or the evidence of a contract which the law creates, and which lies behind the ticket. In such case the law makes the contract, and regulates the reciprocal rights and duties of both carrier and passengers, and the ticket is a mere token that such contract exists, and that under it the passenger is entitled to be carried to and from the points named, without regard to a time limit printed upon it. *The ticket itself, however, is not presumed to set out the terms of the contract, and the passenger is not required or expected to look to it for any stipulations or conditions different from what the law imposes.* This rule we consider to be beneficial alike to carrier and passenger, and well supported by the great weight of authority in this and other states.” (Italics ours.)

In the case of *Logan v. Hannibal & St. J. Ry. Co.*, reported in 12 Am. & Eng. R. R. Cases, at page 142, Henry, J. quotes and adopts, from Thompson on Carriers of Passengers, the following: “A ticket cannot be said to be either the contract, or contain the contract. The settled opinion is that it is a mere receipt taken or voucher adopted, for convenience, to show that the passenger has paid his fare from one place to another. A contract for transportation may, therefore, be proved independently of the terms of the ticket.” The case here quoted from illustrates that the principal now under consideration may operate for and against both carrier and passenger. The distinction between a passage ticket and a bill of lading, in their nature as contracts, is clearly pointed out by Dyer, J., in the case of *Mauritz v. N. Y. L. E. & W. R. Co.* (C. C.) 23 Fed. 765, and in the note to that case, at page 774. The clear weight of authority is to this effect, and we will cite only a few of the many cases upon the subject among which are the following: *Buffett v. Troy & B. R. R. Co.*, 40 N. Y. 171; *Rawson v. Penn. R. R. Co.* (N. Y.) 8 Am. Rep. 543, 545; *K. C., St. J. & C. B. Ry. Co. v. Rodebaugh* (Kan.) 5 Am. St. Rep. 715-718. In *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469, and in *Van Buskirk v. Roberts*, 31 N. Y. 661, it is held that passage tickets do not come within the rule of written contracts.

The rule as stated in the foregoing authorities must, we think, be conceded to be sound upon both reason and principle. The ticket is issued and delivered to the passenger, so that he may present it to the conductor as evidence entitling the holder to a seat and necessary accommodations on the train. As soon as the conductor is presented with this evidence, he usually takes it up, and the passenger has no further right to its possession. It, therefore, does not perform the usual functions of a written contract, in the usual and generally accepted meaning of that

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term. The duties arising from the relation of carrier and passenger are regulated by law, and, as is well said by Mr. Justice Wilkes in the Watson Case, *supra*, no presumption arises from the purchase of a ticket that the ordinary duties imposed by law are modified in the ticket. In the case at bar, therefore, when the objection was made, it appeared from both the complaint and the evidence that respondent was not suing for a breach of the contract, strictly speaking, but for a negligent failure of appellant in providing him with the care and protection to which the law entitled him. The evidence showed, at the time the objection was interposed, that the relation of carrier and passenger had existed and continued for more than 12 hours when the conditions arose of which respondent complains. His ticket had been inspected by both an official at the depot in Oakland, when he was admitted into the car, and by the conductor after he had been admitted into it, and had been surrendered to the conductor, who, for the purposes of this case, was appellant. If respondent had brought his action upon the ground that appellant refused to carry him on presentation of his ticket, then it might be that his right to be carried at that time, and on that particular train, would be evidenced by the ticket. In such a case the law may well be that there is no presumption that a mere ticket, without a further showing, would entitle the holder to ride on all trains run by the appellant, and, in order to recover for a breach of that character, the party complaining would have to prove the right to board that particular train in order to establish a breach. But in this case, as we have seen, the respondent complained only of the negligent failure of the appellant in not caring for and protecting him in the manner the law required. The objection, therefore, did not, as we view it, fall within the principle contended for by counsel, nor within the authorities cited by them.

Assuming, but not deciding, that the ticket in this case was a contract, and that the action was based thereon, did not court err in overruling the objection, in view of the state of the evidence and the pleadings in this case? Our answer again must be in the negative. The evidence in this case is to the effect that the ticket purchased by respondent was what is designated as a "coupon ticket," and that the conductor on appellant's train had taken up the coupon or coupons good for passage between Oakland, Cal., and Ogden, Utah. It has repeatedly been held that when what are known as "through tickets," in the form of coupons, are sold, each coupon is to be regarded as a separate and distinct ticket. In the case of Knight v. Portland S. & P. Ry. Co., 56 Me., at page 240, 96 Am. Dec. 449, the rule is stated in the following language: "The through tickets in the form of coupons, \* \* \* are to be regarded as distinct tickets for each road, sold by the first company as agents for the other companies. The rights and liabilities of the parties are the same as if the purchase had been made of the defendants at their station." This text is amply sustained by the authorities. 4 Elliott, Railroads, § 1596, and authorities there cited. We know of neither law nor reason, to the

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contrary where, as in this case, nothing is involved except a failure to comply with the duties imposed by law. If the respondent had sought to hold appellant to special duties arising out of a special contract, it may well be that the contract imposing them should have been produced; but this would again be so because, without proving what the contract was, no breach thereof could be shown. If in this case, therefore, we assume the ticket in question to be a contract, under the law making each coupon a separate and distinct ticket, how can we escape the conclusion that the notice to produce it, served upon appellant, was not a compliance with the exception mentioned in section 3410, which admits secondary evidence of the contents of writings after a failure to produce the original by the party in whose possession it is shown to be. The evidence was that respondent had surrendered the coupon to the appellant. It had a right to receive it, and the coupon was, it must be assumed, issued for that express purpose. Why, then, was a notice to produce the ticket, served upon the appellant, not all that is, and well can be, required under the law?

We do not overlook the fact that counsel claim that the notice upon them was to the effect that they produce the ticket, and by that they construe it to mean the whole ticket. But, since the law makes each coupon a distinct and separate ticket, the law would, no doubt, have absolved them if they had produced the coupon surrendered to their client. But they did not do this. Respondent, however, did not testify to the contents of the ticket, unless it may be said that designating it as a first-class ticket was doing so. We may assume, we think, that the coupon surrendered to appellant, if it apprised it of anything beyond the mere right to a passage by the respondent, certainly apprised it of the class to which the ticket belonged. This is all that respondent testified to. This is all that is contained in the objection. When notice was served upon it, therefore, to produce the ticket, it should have produced, at least, the ticket surrendered to it, or have made some showing exonerating it from doing so. The court had no right to presume that appellant could not produce that which was confessedly issued for its benefit, and which the evidence disclosed was surrendered into its possession. If appellant was in danger of being injured in any way by the testimony of the respondent in testifying that the ticket was a first-class ticket, it had it within its power, so far as the evidence disclosed, and as a presumption of law arising from its possession of the ticket, to prevent injury by producing the same. The rule of evidence permitting secondary evidence in such cases is based precisely upon this ground. If, upon the other hand, the ticket did not disclose the class to which it belonged, then the respondent did not, and could not, in what he said, testify to the contents of a writing.

But we think, in the absence of any pleading or evidence to the contrary, that a passenger is entitled to reasonable care and protection, regardless of the class of his ticket. The want of this

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is what respondent complained of. It is true that he set forth in his complaint that he had purchased a first-class ticket; but this allegation was not necessary, and was alleged for the purpose merely of showing his right to become a passenger, or his relation to the appellant. After showing the relationship, he was entitled to all that the law granted, and in the absence of a special agreement to the contrary he could claim no more, and the appellant could grant him no less. If, therefore, there was an agreement whereby the respondent was entitled to less than the law gave him by reason of the relationship, the appellant should have pleaded such agreement; if, on the other hand, the respondent did claim more than this, he must assume the burden and plead and prove it. But to ask only that which the law gives, by reason of the relationship, cast upon him no such burden. 4 Elliott, Railroads, §§ 1438, 1693, 1696. Limiting this decision, therefore, to the facts in this case and the law applicable thereto, the court did not err in permitting the respondent to answer the question objected to.

This is made more apparent still from the testimony given by respondent in the case subsequent to the question objected to. He testified, without objection, and we cannot see upon what ground an objection could have been availing, that he several times, during the journey between Reno, Nev., and Ogden, Utah, called the conductor's attention to the fact that respondent had a first-class ticket, and that he was not getting either the treatment or protection to which that entitled him. The appellant was thus, at the very time of the occurrence, apprised of respondent's claim to a first-class passage. So far as the evidence shows, the conductor, who for that purpose was the appellant, did not dispute this claim. In this view, therefore, there was, and could be, no injury to appellant's rights. But, beyond all this, if we assume that the ticket in this case constituted a contract, a matter we do not decide, then the lower court could not rule otherwise than it did under the evidence as it stood when the objection was made, in view of the ruling of this court in the case of Dwyer v. Salt Lake City Mfg. Co., 14 Utah, 339, 47 Pac. 311. The case at bar falls, at least, within the law as the same is stated to be in that case.

Even if we should feel inclined to follow the rule contended for by counsel for appellant, which, in view of the ruling in the Dwyer Case, as at present advised, we are not, in respect to when secondary evidence may not be introduced of a writing, when such writing is in the possession of a person residing out of the state, still this case does not fall within the class of cases cited by counsel upon that question. The pith of the cases cited by them is well stated in the syllabus of the case of Wiseman v. Southern Pac. Ry. Co., 20 Or. 425, 26 Pac. 272, 23 Am. St. Rep. 135, in the following language: "Where the cause of action or defense is founded upon an alleged writing, and both the execution and contents of the writing are denied, and the alleged writing is shown to be in the possession of a person residing outside of

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the state, secondary evidence of its contents is not admissible, unless proper effort is made to obtain the original." While there is much force in the argument of counsel why the foregoing rule should prevail, it cannot be given application unless the case wherein it is sought to enforce it falls within the rule. This case, as we have endeavored to show, does not do so for at least three reasons: (1) The case is not one where the cause of action is distinctly based upon a written contract, but is an action for tort. (2) Railroad tickets are not, as a general rule, deemed to be contracts in writing and there is nothing in the evidence in this case which takes it out of the general rule. (3) The coupon surrendered to appellant was a distinct and separate ticket for the purposes of this case, which was surrendered to appellant in this state, and notice was duly served upon it, giving it an opportunity to produce the same, and thus protect itself against secondary evidence.

No doubt we could have saved much time and labor in this case by simply declaring that the objection in this case was at least within the rule announced in the Dwyer Case, *supra*. But in view of the strenuous insistence of counsel that appellant was prejudiced by the court's ruling, and in further view of the fact that the question is of great importance to the traveling public and carriers of passengers alike, and the question respecting the nature of railroad tickets being squarely presented, we deemed it best to examine the question from the standpoint of both principle and authority, in the hope of avoiding, if possible, further contentions upon the subject-matter involved.

The second assignment needs no extended consideration. The principle of law that a person cannot recover for damages he could have prevented by a reasonable effort on his part, contended for by counsel, is well established, and should, in all proper cases, be enforced. But we can find no ground upon which to base the rule in this case, in view of the evidence. The respondent, as well as other passengers, at least several times during the journey, lasting nearly 24 hours, directed the conductor's attention to the obnoxious conditions surrounding them, and demanded relief. To appeal to the conductor for the purpose of obtaining relief from the prevailing conditions was, in effect, an appeal to the appellant. The conductor, however, informed respondent, and other passengers in his presence, that no relief could be obtained. Was it respondent's duty to seek where appellant's representative, employed for that purpose, could find none? But in any event this was a matter for the jury under all the facts and circumstances. We cannot say as a matter of law that it was respondent's duty to leave the train, especially in view that the evidence does not disclose that he might not have encountered other difficulties by doing so, and that he had the ready means at his command to obtain passage on another train, or that it was not necessary for him to continue his journey at that time. We think this record does not present a case where we can say as a matter of law that the respondent should have acted differently in order



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to avoid further injury or damage. The whole matter was one for determination by the jury. The right to recover damages under the circumstances of this case is well settled by the authorities. *Taylor v. Wabash R. R. Co.* (Mo.) 38 S. W. 304, 42 L. R. A. 110; *Ray on Negligence of Imposed Duties of Carriers of Passengers*, § 107, and the numerous cases there cited; 3 *Thompson, Com. on the Law of Negligence*, §§ 3083, 3087, 3185, 3186.

The judgment is therefore affirmed, with costs.

McCARTY, C. J., and STRAUP, J., concur.

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**JENKINS v. CHESAPEAKE & O. RY. CO.**

(Supreme Court of Appeals of West Virginia, March 26, 1907.)

[57 S. E. Rep. 48.]

**Carrier—Action by Passenger—Breach of Contract.**—Where, by a contract made between a county court and a railroad company for the mutual advantage of the parties thereto in preventing the spread of a contagious disease, the carrier agrees, in consideration that the county court shall provide and maintain a pesthouse for the care and treatment of persons infected with such disease, to furnish and properly equip a car therefor, and transport such persons to the pesthouse, one of the class of persons therein designated in whose interest it is made may maintain in his own name an action against such carrier, either in assumpsit upon the contract or in tort, for damages resulting from a breach of its duty to him under the contract, or arising out of the relation of carrier and passenger after he has been accepted as a passenger.

**Same—Pleading and Proof—Variance.**—In such suit a declaration, which counts as upon a special contract for carriage between the plaintiff and defendant for hire and reward, is not supported by proof of a contract between the county court and the defendant company, nor by the implied contract between the carrier and passenger; the variance being fatal.

**Same—Declaration.**—A declaration in assumpsit by one entitled to the benefit of such contract, which properly impleads the railroad company thereon and for a breach of its duty to him thereunder, is good upon demurrer.

**Appeal—Review—Rulings on Pleadings.**—A writ of error awarded the defendant in such a case does not bring up the action of the trial court in sustaining the demurrer to such rejected count; and this court cannot look to such count to support the verdict and judgment for the plaintiff.

**Trial—Instructions—Applicability to Pleadings.**—On the trial of such a case, instructions for the plaintiff based upon the theory of an implied contract, and which ignore the special contract alleged in the declaration, are inapposite, and should be refused.



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**Carriers—Pleading and Proof—Instructions.**—Upon the trial of this case, an instruction for the defendant, which told the jury that the plaintiff, having alleged in his declaration that the defendant agreed to carry him for hire and reward and having failed to prove such allegation, was not entitled to recover in an action of assumpsit, was improperly refused.

(Syllabus by the Court.)

Error to Circuit Court, Fayette County.

Action by David Jenkins against the Chesapeake & Ohio Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

*Simms & Enslow*, for plaintiff in error.

*Dillon & Nuckolls*, for defendant in error.

MILLER, J. The plaintiff in December, 1903, during the prevalence of an epidemic of smallpox in Fayette county, and who had been taken with that disease, was arrested at Montgomery by the health officers near the railroad of the defendant company about 3 o'clock in the afternoon, and put into a common box car and locked up, without any provision for fire or bed clothing to protect him from the severe cold weather then prevailing. This car was, about 6 o'clock in the evening of the same day, taken by the defendant, put into a freight train, and about 12 o'clock that night set out on a side track at Fire Creek, near the county pesthouse, without any notice to the defendant's agent or to the pesthouse authorities. The next morning about 10 o'clock the plaintiff was discovered, taken out of the car, and carried to the pesthouse, where it was found that both his feet were badly frozen, so that in a few days the flesh began to slough off the bones, necessitating amputation of one leg in May and the other in July following. He endured intense suffering the night of his arrest and transportation and for several weeks afterward; but finally recovered from the disease, and was released.

The plaintiff had nothing to do with the arrangements with the railroad for his transportation. In November, 1904, he instituted this suit in assumpsit in the circuit court of Fayette county. The declaration is in two counts, to recover damages as for the breach of a contract for carriage with the defendant company. The first count charges that the defendant company on the 24th day of December, 1903, accepted the plaintiff as a passenger upon one of its freight trains for hire and reward, and then and there agreed to carry, transport, and deliver him safely and securely and protect him against the cold and inclement weather while such passenger from Montgomery to Fire Creek, and then and there deliver him to the superintendent of the county pesthouse. It then charges the defendant company with breach of its contract and duty to the plaintiff as a passenger. The second count counts upon an alleged contract or arrangement with the county court of Fayette county with the defendant company, whereby,

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in consideration that said county court would provide and maintain a pesthouse at Fire Creek for the purpose of treating, caring for, and preventing the spread of smallpox in said county and along the defendant's railway, detrimental to its business, the defendant agreed to provide and especially equip a car with necessary heat and conveniences for smallpox patients, and deliver all persons who might be suffering from that disease to the said pesthouse, to be there taken charge of by the county authorities. It is further alleged by said second count that the plaintiff, pursuant to this agreement and by authority of one of the members of the board of health of said county, was delivered to the defendant to be transported and carried from Montgomery to said pesthouse; that the defendant accepted the plaintiff as a passenger, and agreed to provide a comfortable car for the purpose, to protect him while in its charge from undue exposure to cold, and to safely deliver him to the pesthouse authorities; the breach of which contract of the defendant and of its duties to the plaintiff is charged as resulting in the injuries he sustained, and for which he asks \$25,000 damages. The court below sustained the defendant's demurrer to the second count, and overruled it as to the first. There was issue and trial only on the first count, resulting in a verdict and judgment thereon for the plaintiff for \$3,000. The trial court refused a new trial, and the case is here upon a writ of error prosecuted by the defendant company. Upon the trial there was practically no conflict of evidence respecting the manner in which the plaintiff had been dealt with by the health officers and by the railroad company, nor does the evidence leave any doubt that the plaintiff lost his legs by the cruel and inhuman treatment of the health officers and the agents of the railroad company; and, if we disturb the verdict and judgment, it will be because of technical rules of practice binding us and now urged for reversal of the judgment.

It is claimed by the railroad company that the plaintiff's remedy was *ex delicto*, and not *ex contractu*, and that his suit in assumpsit was not a proper substitute for one in case. The plaintiff, on the other hand, seeks to sustain the verdict and judgment, not upon an actual contract of carriage for hire and reward with the defendant, as charged in the first count and of which there is absolutely no evidence, but, first, upon the implied contract which he claims arose out of the relationship of carrier and passenger while being carried from Montgomery to Fire Creek; and, second, upon the theory that the contract for carriage made by the county court with the defendant company was for his sole benefit, or for him as one of a class of smallpox patients, which he is entitled to enforce. The first count unmistakably pleads a special contract of carriage for hire and reward; and the verdict and judgment cannot stand unless the contract as laid is supported by proof. *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664, cited with approval in *Kline v. McClean*, 33 W. Va. 37, 10 S. E. 11, 5 L. R. A. 400; *Davisson v. Ford*, 23 W. Va. 617, 627. It is suggested

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that, while this count charges a contract of carriage for hire and reward, it does not allege payment of the price, and that the consideration charged may be treated as surplusage and the declaration stand as upon an implied contract arising out of the relation of carrier and passenger. In actions *ex delicto* words of promise, agreement, and undertaking contained in a declaration may be treated as mere inducement to the duty imposed by law; but in actions *ex contractu*, where there is an averment of a promise and consideration, the declaration will be construed as upon the contract, and not for the breach of the duty. 3 *Hutchinson on Carr.* (3d Ed.) § 1328. And the plaintiff can recover only on the ground stated in his declaration. *Hutch. on Carr.* § 1406; *Kidder v. Flagg*, 28 Me. 477. The form of action in cases of this kind is indifferent, whether *assumpsit* for a breach of the contract express or implied to carry safely, or an action on the case for the wrong. The pleader, considering the advantages or disadvantages of the one or the other form of action, must make his choice. An action on the contract survives. One in case for the wrong dies with the death of the plaintiff. *Hutch. on Carr.* §§ 1403, 1404, 1405. At common law, in the absence of an express contract or promise, if from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation and consequential damages, although *assumpsit* may be maintained upon the promise, the more appropriate form of action is in case. *Hutch. on Carr.* § 1408. In the case at bar the plaintiff elected to sue in *assumpsit*; and the count in the declaration upon which the trial was had was upon a contract of carriage for hire and reward described as entire. In such cases, if there be even a very slight variation in the proof of it from the description, the variance is fatal. *Hutch. on Carr.* § 1335, and cases cited; *James & Mitchell v. Adams*, 8 W. Va. 568; *Id.*, 16 W. Va. 245; Cyc. 356; *Colburn v. Pomeroy*, 44 N. H. 19, citing 1 Ch. Pl. 297, and other cases. In an action of *assumpsit* one of the defenses is want of consideration. 5 *Rob. Prac.* 255. The only proof offered of any contract for carriage related to the one alleged in the second count of the declaration. The writ of error awarded does not bring up the action of the trial court in sustaining the demurrer to that count. We cannot look to it, therefore, to support the verdict and judgment. There was no issue on that count, no trial, and no response thereto by the verdict of the jury. *Met. Life Ins. Co. v. Rutherford*, 95 Va. 773, 780, 30 S. E. 383. From these authorities we are forced to the conclusion that the court below erred in refusing to give to the jury the defendant's instruction No. 1, based on the failure of the plaintiff's evidence to prove the contract as alleged, and in refusing to set aside the verdict of the jury and award the defendant a new trial.

The only other errors assigned relate to the rulings of the court below upon the plaintiff's instructions numbered 2, 3, 4 and 9. These are all based upon the theory of an implied contract of carriage, not the expressed contract alleged in the first count.

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No. 2 tells the jury, in substance, that if they find that persons other than the defendant or its agents put the plaintiff, infected with smallpox, in the defendant's car to be transported to the pesthouse, and, after being informed thereof, hauled the said car from Montgomery to its siding at Fire Creek, the plaintiff thereby became a passenger in said car. The third says that, if under substantially the same circumstances stated in the second the defendant accepted the plaintiff as a passenger for the purposes stated, it became thereby bound to observe all the obligations of care, diligence, and provision for safety and comfort due from carrier to passenger in like condition. The fourth propounded to the jury the proposition that if a carrier, though not obliged to do so, accepts as a passenger one infected with a contagious disease, it is bound to exercise the degree of care commensurate with the responsibility it has thus voluntarily assumed to insure the safety of the passenger, considering his physical condition; and the ninth is substantially a restatement in a different form of No. 2. These instructions, while we think they correctly propound the abstract propositions of law covered by them and are supported by the authorities cited by counsel, yet they were not apropos. They might be suited to a case made upon an implied contract, but they ignore the necessary element of special contract charged in the declaration on which the case was tried. Point of Syllabus in *Peters v. Nolan Coal Co.* (decided at the present term) 56 S. E. 735. The defendant's objections to these instructions, therefore, were well founded, and should have been sustained.

The plaintiff has cross-assigned as error the ruling of the court below sustaining its demurrer to said second count. We think that count is good, and, if sustained by proof, will entitle the plaintiff to recover. The contract being there stated, however, as an entirety, the plaintiff may possibly encounter some difficulties in sustaining it in all its parts by competent evidence. This count distinctly states an agreement, we think, upon a proper consideration, made between the county court and the railroad company, to meet the emergencies of an epidemic of smallpox and to provide against the same, not only in the interest of the public, but of the railroad company. On the part of the county court, it agreed to establish and maintain a pesthouse; and, in consideration thereof, on the part of the railroad company it agreed to provide and equip a proper car and furnish transportation for patients. While the contract as alleged was in the interest of the parties thereto, it was also made in the interest of a person of that class of which the plaintiff was one; and, when the plaintiff was received, voluntarily or involuntarily, as a passenger upon the defendant's car, to be transported under that contract thus made, the obligations of carrier and passenger at once arose under the contract, as well as impliedly, for the proper, safe, and convenient transportation contemplated by the contract; and for a breach of the duty of the defendant to him under the contract the plaintiff would have a proper cause of action, either upon the contract

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or in an action *ex delicto*, as he might elect. This position seems well supported by numerous authorities cited by counsel. Among them are Hutch. on Carr. (2d Ed.) § 537 (see, also, 3d Ed. § 992, note 27); 3 Page on Cont. § 1308 and notes; Rowan v. Hull, 55 W. Va. 335, Syl., point 5, 47 S. E. 92, 104 Am. St. Rep. 998. Besides these authorities and others cited by counsel, our own Code (Code 1899, § 2, c. 71 [Code 1906, § 3021]) provides that "if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only and the consideration had moved from him to the party making such covenant or promise." See on this subject, also, Nutter v. Sydenstricker, 11 W. Va. 547, Johnson v. McClung, 26 W. Va. 659, and Ross v. Milne, 12 Leigh. (Va.) 204, 37 Am. Dec. 646. This doctrine has been extended, by persuasive authority, to one of a class of persons where the class is sufficiently designated. Burton v. Larkin, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; Johannes v. Ins. Co., 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; Locklin v. Beckwith, 6 N. Y. St. 583.

We therefore reverse the judgment of the circuit court, overrule the demurrer to the second count of the declaration, set aside the verdict of the jury, and award the defendant a new trial; and the cause is remanded to the court below, with leave to the plaintiff, if so advised, to amend his declaration, and to be further proceeded with according to law.

HULL *v.* SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, March 9, 1907.)

[57 S. E. Rep. 28.]

**Witnesses—Competency—Juror in Previous Case—Examination of Premises.**—In an action against a railroad company for wrongful death, one who, as juror in another case against the same defendant for the wrongful death of another in the same catastrophe, examined the trestle which fell, in charge of the court, may testify as to the condition of the timber of the trestle at the time of the examination.

**Carriers—Injury to Passenger—Willfulness.**—In an action for injuries to a passenger, a refusal to charge that defendant cannot be guilty of wantonness or willfulness unless he has been guilty of misconduct or malice, is not prejudicial, where the court charged that it takes more than gross negligence to show willfulness or wantonness.

**Constitutional Law—Due Process of Law.\***—Civ. Code, 1902, § 2852, permitting exemplary damages in actions for negligent killing where the wrongful act was the result of recklessness, wantonness, or malice, does not deprive the carrier of its property without due process of law.

Appeal from Common Pleas Circuit Court of York County; Klugh, Judge.

Action by J. O. Hull, as administrator *de bonis non* of Anne S. McManus, against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant appeals. Affirmed.

*J. L. Glenn* and *W. B. McCaw*, for appellant.

*Wilson & Wilson*, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained as a result of the negligent, willful, reckless, and wanton conduct of the defendant, causing the death of plaintiff's intestate. The complaint alleges that Mrs. Anne E. McManus, being a passenger on defendant's train, came to her death in the following manner: That, when the train was passing over the trestle near Catawba river, the trestle gave way and the coach in which she was traveling, as well as the entire train, fell to the ground; that very shortly after the falling of said train, and before she could be extricated from the wreck, a freight train, running at a rapid rate of speed, ran into the wreck and killed

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\*For the authorities in this series on the subject of the constitutionality of statutes prescribing a penalty to compel railroads to perform their duties to the public, etc., see foot-notes appended to *Lexington Grocery Co. v. Southern Ry. Co.* (N. Car.), 14 R. R. R. 349, 37 Am. & Eng. R. Cas., N. S., 349; foot-notes appended to *American Express Co. v. Southern Indiana Express Co.* (Ind.), 21 R. R. R. 425, 44 Am. & Eng. R. Cas., N. S., 425; foot-notes appended to *State v. Great Northern Ry. Co.* (Wash.), 21 R. R. R. 184, 44 Am. & Eng. R. Cas., N. S., 184.



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her. It was alleged that the trestle was rotten and insecure, that the freight train was running too close behind the passenger train, that the crew of the freight train failed to keep a proper lookout, and that there was a failure to flag the freight train. The defendant denied the material allegations of the complaint. The jury rendered a verdict in favor of the plaintiff for \$25,000, and the defendant appealed.

1. The first question that will be considered is whether his honor, the presiding judge, erred in permitting witnesses to testify as to the condition of the timber in the trestle where the accident occurred at the date of their visit, when these witnesses, who were members of the jury impaneled to try the case of *Waverly Fairman* against the defendant, as a part of the duties imposed by the court on the jury in that case, visited the structure as a jury in charge of the court. The ruling of the presiding judge was as follows: "It may be that the testimony loses somewhat of its value by reason of the time between the occurrence of the act and the time the witness saw it; but it is perfectly competent for him to state what he saw, by his own examination of it, so far as that might throw light on the question at issue now. The mere fact that he was a sworn member of the jury would not change it. It is perfectly competent for one of those jurors there, if he knows anything about this thing, to be called from the jury box, sworn as a witness, and give his testimony for what he knows about the case; and the mere fact that he made the examination while he was a sworn juror would not render his examination less accurate or less competent. The result of his examination is as competent in all other respects as if he made it as a private individual. It may go to the jury as having been an inspection made some months after the casualty. I think the testimony is perfectly competent." The reasons assigned by the presiding judge are satisfactory to this court, and his ruling is sustained by the case of *State v. Vari*, 35 S. C. 175, 14 S. E. 392.

2. The second assignment of error is that the presiding judge erred in refusing to charge the following request: "I charge you, as a matter of law, that it is the settled law of this state that it takes more than negligence, and also more than gross negligence, to make out a case of willfulness or wantonness. One cannot be said to be guilty of willfulness or wantonness unless he has been guilty of misconduct and malice, or of some act from which misconduct and malice ought to be inferred." The circuit judge charged the first sentence, but refused to charge the second. Each of the words, "wantonness," "willfulness," and "recklessness," embodies the element of malice, either express or implied, and are in law substantially the equivalent of each other, in so far as they give rise to an action based upon punitive damages. *Pickett v. Railroad*, 69 S. C. 445, 48 S. E. 466. The presiding judge charged the jury explicitly that the plaintiff did not have the right to recover punitive damages unless there was wantonness, recklessness, or willfulness; and, while he might very properly have

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charged the entire request, we are unable to discover wherein his refusal was prejudicial to the appellant. This exception and those presenting similar questions are overruled.

3. The next error assigned is because the presiding judge refused the following request: "This action having been brought under section 2852, vol. 1, of the Code of Laws of South Carolina (23 St. at Large, p. 1071), the question of exemplary or punitive damages will not and cannot be submitted to you, inasmuch as so much of said statute as allows exemplary or punitive damages contravenes the Constitution of this state and the Constitution of the United States, in that it deprives the defendant of its property without due process of law." That section provides that in "every such action the jury may give such damages, *including exemplary damages, where such wrongful act, neglect or default was the result of recklessness, willfulness or malice*, as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought." Before the section was amended by adding the words italicized, punitive damages for a wrongful act causing death were not recoverable in this state. *Garrick v. R. R.*, 53 S. C. 448, 31 S. E. 334, 69 Am. St. Rep. 874. The appellant's attorney contend that exemplary damages cannot be proportioned to the injury resulting from the death of the party, as the injury was to the deceased, and not to the persons for whose benefit the action was brought. Their reasons for this proposition are thus stated in their argument: "Punitive damages being only authorized in this state in vindication of a right wrongfully invaded, it is impossible to conceive how a jury could be authorized to give to these beneficiaries certain amounts in vindication of some right, which they did not have. Their rights were not unlawfully invaded when the death of the deceased was brought about. It was the right of the deceased that was unlawfully invaded, and here we think the provisions of both the state and national Constitution have been invaded. If the amendment to the statute is upheld, then it gives to one man punitive or exemplary damages for the invasion of another man's legal rights. In other words, if the railroad company is made to pay money to one man by way of punitive damages, for its unlawful invasion of the rights of another man, does this not deprive it of its property without due process of law? The right of action to the beneficiaries under Lord Campbell's act does not accrue, even under the statute, until the death of the party who loses his life, and the right of action is only for compensation in the full sense of the word for his death. The beneficiaries cannot recover for the pain and suffering of the deceased, or for any wrong done to him."

There would be much force in this reasoning, if punitive damages could only be recovered by those who were dependent upon the deceased for support, or by those who had suffered a pecuniary loss. But it is not essential, even to a recovery of compensatory damages, that the person for whose benefit the action

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is brought should be dependent upon the deceased for support, or that they should suffer pecuniary loss. *Barksdale v. Railroad* (S. C.) 56 S. E. 906. "Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right, which has been willfully invaded; and, indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but in addition thereto operate as a deterring punishment to the wrongdoer, and as a warning to others." *Watts v. Railroad Co.*, 60 S. C. 73, 38 S. E. 240; *Brasington v. Railroad*, 62 S. C. 325, 40 S. E. 665, 89 Am. St. Rep. 905; *Dagnall v. Railroad*, 69 S. C. 110, 48 S. E. 97; *Duckett v. Pool*, 34 S. C. 311, 13 S. E. 542. "The plaintiff is as much entitled to the damages arising from an act of intentional wrong, as to those growing out of a negligence." *Griffin v. Railroad*, 65 S. C. 122, 43 S. E. 445. "In an action for a willful tort, the jury has the right to take into consideration two elements of damages: (1) Compensation for the injury sustained, as to which the plaintiff is confined to the recovery of such damages as flow naturally and proximately from the wrongful act; and (2) the conduct of the defendant, for which the plaintiff is entitled to recover exemplary damages, sometimes called punitive or vindictive damages. The exemplary damages are in addition to the compensatory damages." *Pickens v. Railroad*, 54 S. C. 498, 506, 32 S. E. 567. These authorities show that the exceptions raising this question must be overruled.

The last assignment of error is because the presiding judge refused the motion for a new trial. But the appellant's attorneys admit that it was based upon grounds presented in the other exceptions, which have been considered.

It is the judgment of this court that the judgment of the circuit court be affirmed.

SOUTHERN RY. CO. IN KENTUCKY *v.* LEE *et al.*

(Court of Appeals of Kentucky, April 18, 1907.)

[101 S. W. Rep. 307.]

**Carriers—Who Are Passengers—Payment of Fare.\***—The fact that no fare was paid for a child by the person in charge of him upon the train did not deprive him of the character of a passenger, where he was riding with the knowledge of and without objection by the conductor.

**Same—Action for Injuries—Punitive Damages.†**—In an action for personal injuries caused by a railroad accident, in the absence of evidence of gross negligence, punitive damages for such negligence cannot be recovered, since the presumption that the accident and resulting injury were caused by the carrier's negligence does not embrace gross negligence.

Appeal from Circuit Court, Mercer County.

"Not to be officially reported."

Action by De Witt Lee, by his next friend, against the Southern Railway Company in Kentucky. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

*Humphrey & Humphrey* and *E. H. Gaither*, for appellant.

*Emmett Puryear*, *Robert Harding*, *Chas. A. Hardin*, *T. H. Hardin*, and *Greene & Van Winkle*, for appellee.

CARROLL, C. Appellee is a child about six years old, and brought this action by his next friend against appellant to recover damages for injuries sustained whilst a passenger on one of its trains. Upon a trial of the case a verdict for \$1,000 was rendered, and a motion for a new trial having been overruled, this appeal is prosecuted.

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\*For the authorities in this series on the question, who are, and are not, passengers, see foot-notes appended to *Malott v. Central Trust Co.* (Ind.), 22 R. R. R. 189, 45 Am. & Eng. R. Cas., N. S., 189; foot-notes appended to *Chicago Union Traction Co. v. Rosenthal* (Ill.), 21 R. R. R. 747, 44 Am. & Eng. R. Cas., N. S., 747; foot-notes appended to *Waller v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; foot-note appended to *Smallwood v. Baltimore & O. R. Co.* (Pa.), 21 R. R. R. 290, 44 Am. & Eng. R. Cas., N. S., 290; *Colorado Springs, etc., Ry. Co. v. Petit* (Colo.), 21 R. R. R. 132, 44 Am. & Eng. R. Cas., N. S., 132; *Illinois Cent. R. Co. v. Porter* (Tenn.), 20 R. R. R. 686, 43 Am. & Eng. R. Cas., N. S., 686.

†For the authorities in this series on the question whether punitive or exemplary damages are recoverable for wrongs to passengers, see foot-notes appended to *Milhouse v. Southern Ry. Co.* (S. Car.), 21 R. R. R. 734, 44 Am. & Eng. R. Cas., N. S., 734; foot-notes appended to *Tennessee Cent. R. Co. v. Brasher's Guardian* (Ky.), 21 R. R. R. 419, 44 Am. & Eng. R. Cas., N. S., 419; foot-note appended to *Tucker v. Southern Ry. Co.* (S. Car.), 21 R. R. R. 135, 44 Am. & Eng. R. Cas., N. S., 135.

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Appellee was injured in a collision caused by the train on which he was riding running into an open switch and striking some cars standing thereon. The record does not disclose any facts whatever concerning the cause or nature of the accident that happened to the train. Appellee, in company with his grandmother, took passage on the train at Louisville for their home in Harrodsburg. His grandmother did not purchase any ticket for him, or pay his fare, although some inquiry was made by the conductor about collecting fare for the child. We do not regard it as material whether his fare was paid or not. He was a passenger on the train, and no tangible or substantial objection was made by the conductor to his riding without his fare being paid; nor was any fraud practiced upon the conductor by the person in charge of the little boy. In *Louisville & Nashville Railroad Company v. Scott's Adm'r*, 56 S. W. 674, 22 Ky. Law Rep. 30, 50 L. R. A. 381, it is said that: "The payment of fare or price of carriage is not necessary to constitute one a passenger, or to give rise to a liability upon the part of the carrier. Although the conductor may have been violating the rule of the company, and carried the decedent without fare, still that fact could not deprive him of the character of passenger, or relieve the company of the duty imposed upon it as to passengers. In this case it was not proven, nor did it offer to prove, that the decedent tried to practice any fraud upon it to obtain passage upon its train. The conductor was in charge of the train, and by his courtesy and permission the decedent was carried, and was entitled to receive the care which the law imposes on a carrier of passengers." In *Hutchinson on Carriers*, § 1020, the law is thus stated: "So a person accepted for carriage without payment or acceptance of fare is entitled to be considered a passenger. Thus, a child riding on a street car upon the invitation of the driver, without paying or intending to pay fare, a child of tender years, carried in the arms of its mother, who was a paying passenger, or a child of the age entitled to ride free and traveling with its parents, who were riding on a free pass, is a passenger, and entitled to protection as such. But a child or other person, who goes upon the car or train without intending to pay fare, and without the knowledge of the carrier, or its express or implied consent or invitation to ride as a passenger, is not a passenger, but at most a stranger, if not a trespasser, and is entitled to but ordinary care."

Here the conductor made some inquiry about the fare of the child, when the person in charge of him said that she had often traveled with him, but had never paid any fare. With this statement the matter was dismissed, and the conductor did not make any other or further effort to collect his fare. He was, therefore, entitled to the same right and protection as if his fare had been paid, and no instruction upon this issue under the facts disclosed by the record should have been submitted to the jury. It appears that appellee from his birth has been a feeble, delicate, sickly child, afflicted with a dreadful disease, that not only rendered

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him nervous to such an extent that ordinary noise would cause him to fall down upon the floor, but also resulted in partial paralysis of his body. The evidence conduces to show that when the collision occurred the child was thrown against some object in the car that caused bruises on his body and knocked out four of his teeth, that his gums bled profusely, and that afterwards he was more nervous than before the injury. There is some conflict in the evidence as to whether the teeth knocked out were his first or second teeth. His relatives say they were his second teeth, whilst a capable physician, who examined him in the presence of the jury, testified that they were his first or milk teeth. If they were his first teeth, the fact that he lost them would be a matter of small consequence, because his second teeth will come in their place, and he would have lost his first ones under the laws of nature in a short time. If they were his second teeth, it would be a more serious matter. In view of the fact that there must be a new trial, we do not express any opinion upon this controverted issue, but may say that, if the teeth he lost were not his second teeth, the evidence does not disclose that the child sustained any permanent injury.

The principal error complained of is the action of the trial court in instructing the jury that, if they believed appellee was injured by the gross negligence of the carrier, they might award punitive damages. The petition averred that the accident to the train was caused by the gross negligence of the railroad company. The answer does not controvert the averment that the accident was caused by the negligence of the company, but denies that it was guilty of gross negligence, and, as before stated, no evidence was introduced concerning the cause of the accident. Under this condition of the record, counsel for appellant insists that it was improper to instruct the jury upon the question of the gross negligence of the company. There is no doubt about the legal proposition that generally, when a passenger on a railroad train is injured as the result of an accident happening to the train, the burden of proof is upon the carrier to show that it was not guilty of any neglect. The presumption of law is that the accident and resulting injury was caused by his negligence; but the question remains whether or not it will be presumed that it was guilty of gross negligence. Ordinarily a person injured by an accident, whether he be a passenger or not, is only entitled to recover compensation. If he recovers more than this, it must be because the person causing the injury has been guilty of gross negligence, which entitles the injured party to more than mere compensation. If a passenger is injured by reason of the gross negligence of the carrier, he may recover exemplary damages; and it is competent for a passenger, who is suing to recover damages for injuries sustained, to prove the nature, character, and cause of the accident that happened to the train resulting in his injury, in order that the court may determine whether or not it is proper to submit to the jury the question of the gross negligence of the carrier. But, in the absence of evidence of this



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character, the carrier cannot be held liable for gross negligence, as the presumption against it does not embrace this degree of negligence. Hutchinson on Carriers, §§ 1413-1415; Kentucky Central R. Co. v. Dills, 4 Bush, 593; Louisville & Portland R. Co. v. Smith, 2 Duv. 556; Felton, Receiver v. Holbrook, 56 S. W. 506, 21 Ky. Law Rep. 1824; L. & N. R. Co. v. Simpson, 64 S. W. 783, 23 Ky. Law Rep. 1044; L. & N. R. R. Co. v. Carothers, 65 S. W. 833, 66 S. W. 385, 23 Ky. Law Rep. 1673; L. & N. R. Co. v. Richmond, 67 S. W. 25, 23 Ky. Law Rep. 2394. It was therefore error, under the facts of this case, to instruct the jury on the subject of gross negligence or punitive damages.

The judgment is reversed, with directions to award a new trial in conformity with this opinion.

**CHICAGO, B. & Q. RY. CO. v. MANN.**

(Supreme Court of Nebraska, March 21, 1907.)

[111 N. W. Rep. 379.]

**Carriers—Limitation of Liabilities—Riding in Freight Train.\***—A railroad company may make suitable and reasonable conditions and regulations for carrying passengers on its freight trains, from which they are excluded except by special permission, and an agreement on the part of one holding a special permit, by which he assumes the risks incident to boarding the caboose of such trains at any place where it may be stopped for the purpose of conducting the freight business of the company, does not amount to a limitation of the carrier's liability for its own negligence.

**Same—Who Are Passengers.†**—One holding such a permit, while on his way through the station grounds and yards of the company to board the caboose of a freight train which does not carry passengers except by special permission, is not a passenger being transported over the company's road, within the meaning of section 10,039, Cobbey's Ann. St., 1903, and the duty which the company owes to him is only that of ordinary care.

**Same—Negligence.**—Such a passenger cannot recover for injuries sustained by him while on his way to board the caboose of a freight train, without proof of negligence on the part of the company in the construction or maintenance of its station, station grounds or yards, which is the proximate cause of such injuries.

(Syllabus by the Court.)

Error to District Court, Adams County; Adams, Judge.

Action by Gustave A. Mann against the Chicago, Burlington

\*For the authorities in this series on the question whether a carrier of passengers can limit its liability or exempt itself from liability, see foot-notes appended to Nickles v. Seaboard Air Line Ry. (S. Car.), 20 R. R. R. 755, 43 Am. & Eng. R. Cas., N. S., 755; foot-notes appended to Weaver v. Ann Arbor R. Co. (Mich.), 16 R. R. R. 603, 39 Am. & Eng. R. Cas., N. S., 603.

†See preceding case, and foot-notes.

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& Quincy Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

*John C. Stevens, J. W. Deweese, and F. E. Bishop*, for plaintiff in error.

*Tibbets Bros. & Morey*, for defendant in error.

BARNES, J. On the night of February 18, 1904, Gustave A. Mann, plaintiff below, fell into an ash pit between the rails of the railroad track of the defendant company, while passing from the depot to the caboose of a freight train in which he was about to take passage from the city of Minden to his home in the city of Hastings. The result was a broken leg, to recover for which he brought this action against the company. Judgment being entered in his favor, the railroad company has taken error to this court.

The material facts, from which the question of the liability of the railroad company must be determined, are the following: Mann, with four companions, had been attending a shooting tournament at Minden, and went to the station in the evening in order to take a freight train to his home in Hastings. He was traveling agent for a brewing company, and had occasion, in the course of his business, to make use of the freight trains of the defendant company. For this purpose he procured a permit from the railroad officials, authorizing him to ride upon trains which did not carry passengers, except by special permission. The permit is in the following language:

“Burlington & Missouri River R. R. Co. in Neb.

“(Chicago, Burlington & Quincy Ry. Co., Lessee.)

“Freight Train Permit.

“No. A 1,027

1904

“Conductors, Freight Trains:

“When presented with regular transportation this will be your authority to carry Mr. G. A. Mann, representing Dick Bros., between points where your train stops for other business.

“This permit is subject to conditions printed on back, which must be signed in ink by the person named, but does not authorize agents to flag freight trains.

“Good until December 31, 1904, unless revoked.

G. W. Holdrege,  
General Manager.

“A. B. Smith.

[Countersigned.]

“1904

“Non-Transferable.

“This permit is granted at the special request of, and accepted by, the undersigned upon the following conditions, it being understood that greater danger attaches to riding on freight trains than on a passenger train:

“I hereby agree to assume all risk of accident to my person and loss or damage to my personal effects, and also to board and alight from freight trains only at points where such trains may

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be stopped for the convenience of the Railway Company. It is understood that freight trains do not as a rule start from or stop at stations with the caboose or coach at the station platform.

"Baggage will only be accepted for transportation, under check, on freight trains when there is room in the ordinary equipment of such trains, when baggage may be loaded or unloaded from or to platform without requiring special stop, and when passenger with proper ticket travels on same train.

"G. A. Mann."  
[Sign in ink.]

From the fact that the freight train which the parties were to take was late, they had to remain some time at the defendant's station. The train, on its arrival, stopped upon the first track north of the main track of defendant's road; the space between the two lines of track being about eight feet. The engine of the freight train was east of the depot, and the caboose several yards to the west thereof. The train arrived in Minden about 9 o'clock p. m.; the night being very dark. Some time after its arrival, it was suggested by a Mr. Barnhardt, one of Mann's companions, that it would be well to go down in the yard and board the caboose, as it might not stop at the depot. The entire party then started for the caboose, going along the south side of the freight train, which consisted of about 60 cars. They traveled in the space between the north and south tracks until they came to a pile of cinders. They then turned to the south between the rails of the main track, and three of the parties, including Mann, fell or stepped into the ash pit above mentioned. This pit was situated between the rails of the main track, was about 10 feet long and 12 or 14 inches in depth, and was used for receiving the cinders dumped from the company's engines while taking water at the tank, which stood near the excavation.

It is conceded that the train which Mann was attempting to board was a freight train which carried passengers only by special permission of the company, and that the four persons accompanying him had to obtain special permits to ride thereon. At the request of the plaintiff below, the court instructed the jury as follows: "The jury are instructed that when the carrier of passengers by railroad does not receive passengers into the car at the platform erected for that purpose, but suffers passengers to enter at out of way places, it is its duty to use its utmost care in preventing accidents to passengers while so entering, and to provide for them a safe and convenient way and manner of access to the train, and to prevent, so far as possible, the interposition of any obstacles which would necessarily impede or expose them to harm while proceeding to take seats in the cars; and if you find in this case that defendant's agents were negligent, within the meaning of this instruction, and that the plaintiff was injured thereby, and you should find that plaintiff did not, on his own part, contribute by his negligence to such injury, then your verdict should be for the plaintiff." The court further instructed the jury, in substance,

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that Mann, on the way from the depot to the car, was a passenger, and was not required to exercise that degree of care that is imposed on other persons, but had no right to assume, and rely upon it, that the company would make his way safe, so that he might neglect precautions which are ordinarily imposed upon a person not a passenger, and that the company was required to exercise the strictest vigilance for his safety. The giving of these instructions is assigned as error, and this requires us to determine the legal effect of the contract above quoted, and the duty which a railroad company owes to one holding such permit, and who is about to take passage on one of its freight trains upon which passengers are carried only by such company's permission.

It is contended by the plaintiff below that the contract limits the liability of the defendant company for its own negligence, and is therefore unconstitutional and void. If this contention is sound, the contract cannot be upheld. But we do not so construe the language of the permit. By it the company did not attempt to limit its liability to the plaintiff for its own negligence. It amounts simply to an agreement on the part of the plaintiff that if permitted to ride on defendant's freight trains, from which passengers were excluded, by its proper and necessary regulations, he would board the same at such places as the caboose might be stopped for the convenience of the company in carrying on its freight business; that he would assume the ordinary risks incident thereto, and to the nature of such service when properly conducted. This was not a limitation of the liability of the company for its own negligence, but was a reasonable regulation which it might adopt for the purpose of carrying on its freight business. The rule is well settled that a railroad company, as a common carrier, may make and enforce such a regulation. *Rorer on Railways*, vol. 2, pp. 946-985; *Hale on Bailments & Carriers*, 491; *B. & M. Ry. Co. v. Rose*, 11 Neb. 177, 8 N. W. 433; *I. C. R. R. Co. v. Nelson*, 59 Ill. 110; *C., St. P., M. & O. Ry. Co. v. Schuldt*, 66 Neb. 43, 92 N. W. 162; *Miller v. U. P. Ry. Co.*, 138 Mo. 658, 40 S. W. 894; *Schaller v. C. & N. W. Ry. Co.* (Wis.) 71 N. W. 1042; *Hicks v. U. P. Ry. Co.* (Neb.) 107 N. W. 798.

This brings us to the question of the defendant's duty to the plaintiff at the time the accident occurred. While Mann and the defendant company may have sustained, in a limited way, the relation of carrier and passenger, yet he was not, at that time, a passenger being transported over the defendant's road, within the meaning of section 10,039, *Cobbey's Ann. St.* 1903, and the duty which the company owed to him was only that of ordinary care. It is a well-settled rule that, in the construction and maintenance of its depot grounds and yards, necessary, convenient, and proper for the purpose of conducting its business, the company was only required to exercise ordinary care, and this was the extent of the duty it owed to the plaintiff while he was attempting to board its freight train. *Shearman & Redfield on Negligence*, § 501; *F., E. & M. V. R. R. Co. v. Hagblad* (Neb.) 101 N. W. 1033, 4 L. R. A. (N. S.) 254; *Railway Co. v. Marion*, 104 Ind. 239, 3 N. E.

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874. The plaintiff, by his contract, assumed the risk of walking through the yard in order to board the train in question, and it was not the duty of the defendant company to furnish him an absolutely safe pathway to any place where its caboose might be stopped, for the purpose of conducting its business. He could not shut his eyes to the nature of the business, and, when he accepted that mode of transportation, he assumed the risks incident to the ordinary and proper method of carrying it on. It was said, in *Murch v. Concord Ry. Co.*, 29 N. H. 9, 61 Am. Dec. 631: "The party, who makes an arrangement to be carried on a freight train, impliedly agrees to accept and be satisfied with such accommodations as regards carriages and seats, and the places of entering and leaving the carriages, as may be found in the usual course of the business. \* \* \* The company, considered as owners of the road or as carriers, is not in either case bound to make landings or provisions for the reception or discharge of passengers where none are expected to be. The duties and obligations to parties are construed reasonably, with reference to the nature of their business." See *Oviatt v. Dakota Cent. R. Co.*, 43 Minn. 300, 45 N. W. 436; *C., B. & Q. Ry. Co. v. Troyer*, 103 N. W. 680, 70 Neb. 293.

Applying the foregoing rules to the facts of this case, it seems clear that the giving of the instructions complained of was reversible error. Indeed, we find no evidence in the record showing, or tending to show, that the defendant company was guilty of negligence in construing and maintaining the ash or cinder pit in question; or that its maintenance was not proper and necessary to enable the defendant to conduct its business at the station where the accident occurred. Without proof of negligence in that respect on the part of the defendant, the plaintiff was not entitled to recover.

For the foregoing reasons, the judgment of the district court is reversed, and the cause is remanded for further proceedings according to law.

Reversed and remanded.

MUSSELLAM v. CINCINNATI, N. O. & T. P. Ry. Co. *et al.*

(Court of Appeals of Kentucky, Sept. 26, 1907.)

[104 S. W. Rep. 337.]

**Carriers—Receipt of Freight—Conclusiveness.\***—A receipt by a carrier for freight, though not conclusive, creates a presumption that it received the freight directed therein, and the burden is on it to show the contrary.

**Trial—Instructions—Form.**—The court should not instruct that the burden of proof is on one of the parties, or that the presumption of law is against him; but the instructions should be so framed as to indicate the burden of proof, without specially referring to it.

**Carriers—Loss of Freight—Evidence—Instructions.**—Where, in an action for loss of freight, the shipper introduced in evidence the receipt of the initial carrier, the court should charge that the jury should find for plaintiff against the initial carrier, unless they believed that the shipper had not delivered the freight to it; and that they should find for him against the connecting carrier, unless they believed that the initial carrier had not delivered the freight to the connecting carrier.

**Trial—Question for Jury—Effect of Evidence.**—Where, in an action against the initial and connecting carriers for loss of freight, it was shown that the connecting carrier receipted for seven boxes and made a written acknowledgment that one box was missing, the credibility of the testimony explaining away the receipt and the acknowledgment was for the jury.

**Carriers—Questions for Jury.**—In an action against the initial and connecting carriers for loss of freight, held, that the questions whether the freight was delivered to the initial carrier, and, if it was, whether it was lost by it, or whether it was lost by the connecting carrier, were for the jury.

**Evidence—Statements by Agents—Admissibility.**—The statements of an agent of a carrier, who is its representative to deliver freight, that a part of the freight of a shipper was missing, and that it would be along in a few days, were competent against the carrier.

**Carriers—Loss of Freight—Actions—Evidence.**—In an action against a carrier for loss of freight, the bill of lading received by the shipper and the waybills which went with the freight were competent evidence against the carrier, though not conclusive.

**Trial—Question for Jury.**—The credibility of evidence, in an action against a carrier for loss of freight, which explains the bill of lading received by the shipper and the waybills which went with the freight, is for the jury.

**Evidence—Notice to Produce Secondary Evidence.**—Where a paper is in the possession of a party, the adverse party should before trial

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\*See note at end of case.



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notify the party to produce it, or procure a rule for its production, and, where the paper is not then produced, or it is shown to be lost, secondary evidence of its contents is admissible.

**Same—Similar Transactions.**—Where, in an action against a carrier for loss of freight, the carrier showed that the goods could not have been put in the box delivered to it, evidence that the shipper had packed goods of the same description as those in controversy in a similar box was admissible.

**Property—Evidence of Ownership.**—In an action against a carrier for loss of freight, the testimony of a witness that he saw the shipper in possession of goods similar to those alleged to have been lost, is inadmissible.

**Witnesses—Credibility.**—A party testifying in his own behalf should be permitted to state where he has lived and what business he has followed, so as to give the jury a better idea of the weight to be attached to his evidence.

**Trial—Evidence—Rebuttal.**—Where, in an action against a carrier for loss of freight, a drayman, who took goods of the shipper to the carrier, testified that only six boxes of freight were taken out at the station, and that the shipper told him that he would take the seventh box with his trunk as baggage, it was competent for the shipper to contradict the drayman.

**Carriers—Actions—Evidence.**—In an action against the initial and connecting carriers for loss of freight, evidence that the waybill, made at the place where the goods were delivered to the connecting carrier, was made out from the waybill which accompanied the car, and not from an inspection of the contents of the car, which was sealed, was admissible to explain how it happened that the connecting carrier receipted for the freight.

**Same.**—In an action against a carrier for loss of freight, evidence of the circumstances of the giving of a receipt by the carrier for the freight was admissible to support the defense that the freight had not been delivered to it.

**Appeal—Granting New Trial—Discretion.**—The discretion of the circuit court in granting a new trial will not be interfered with unless palpably abused.

Appeal from Circuit Court, Boyle County.  
“To be officially reported.”

Action by A. Salem Mussellam against the Cincinnati, New Orleans & Texas Pacific Railway Company and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

*Robt. Harding, Emmett Puryear, and Greene & Van Winkle,* for appellant.

*Chas. H. Rodes and John Galvin,* for appellee Cincinnati, New Orleans & Texas Pacific Railway Company.

*Robert T. Quisenberry,* for appellee Southern Railway Company.

**Mussellam v. Cincinnati, etc., Ry. Co**

HOBSON, J. In December, 1904, A. Mussellam delivered to the Southern Railway Company at Knoxville, Tenn. some boxes of oriental goods, to be shipped to himself at Danville, Ky. The railway company gave him a bill of lading for seven boxes, weighing 1,065 pounds. When the goods were delivered to him at Danville, there were only six boxes. The weight of these six boxes is not shown. The goods were carried by the Southern Railway from Knoxville to Harriman, and then delivered to the Cincinnati, New Orleans & Texas Pacific Railway, which took them to Lexington, and from Lexington they were shipped back to Danville. They did not reach Danville until January 10th. He brought this suit against both railways to recover for the loss of the seventh box, the contents of which he valued at something over \$1,800. The defense to the action was in effect that only six boxes were in fact delivered at Knoxville to the Southern Railway. On the first trial of the case, the jury found for him, fixing the damages at \$900. The court granted a new trial. On the second trial, the court gave a peremptory instruction to the jury on all the evidence to find for the Cincinnati, New Orleans & Texas Pacific Railway Company, and, the case being submitted as to the Southern Railway Company, the jury returned a verdict in its favor. Judgment was entered on the verdict, and the plaintiff appeals.

Mussellam, for a week before the shipping of the goods, had been selling at auction at Knoxville goods which he had brought there from St. Louis. The proof for the defendant showed that he did not have at Knoxville the goods which he charged were in the box that was lost. It also showed that these goods could not have been put into such a box; that, after the auction was over, what goods he had left unsold were packed into seven boxes, which were hauled by the transfer wagon to the station. The driver of the wagon said that, when he reached the station, only six boxes were taken out of the wagon; Mussellam telling him that he would take the other box with his trunk as baggage. The agent who checked the boxes said there were only six, weighing 1,065 pounds; that he placed them in a Lexington car and sealed the car with the Knoxville seal. The agent at Lexington testified that, when the car reached him, the seal was unbroken; that he opened the car, and there were only six boxes in it, which he then had placed in the freight depot, and afterward reshipped to Danville. On the other hand, Mussellam testified that this box was not opened at Knoxville, that it was delivered with the other six to the railway company, and that it contained the articles sued for, which the Knoxville witnesses knew nothing about. He not only received a bill of lading at Knoxville for seven boxes, but the waybill which went with the car called for seven boxes. The Cincinnati, New Orleans & Texas Pacific Railway receipted to the Southern Railway for seven boxes, and sent a similar waybill to Danville. The agent at Danville receipted for the freight on seven boxes, weighing 1,065 pounds, "one box missing."

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1. The rule is settled that a receipt is not conclusive between the parties, but is only *prima facie* evidence of what was received. The receipt given by the railway companies for the freight specifying that there were seven boxes created a presumption that they received in fact seven boxes, and the burden of proof is on them to show that only six boxes were in fact received. They may show what was received, but, unless they show to the contrary, the plaintiff is entitled to recover upon his receipt. The instructions which the court gave the jury do not conform to this rule. The court under our practice should not tell the jury that the burden of proof is upon one of the parties, or that the presumption of law is against him; but the instructions should be so framed as to indicate the burden of proof without especially referring to it. Under the instructions of the court, the jury were directed to find for the plaintiff if they believed from the evidence that he had delivered the box to the Southern Railway. This placed the burden of proof on him of showing that he had delivered the box, while the receipt made out a *prima facie* case for him. The court should have instructed the jury that they should find for the plaintiff against the Southern Railway Company, unless they believed from the evidence that the plaintiff had not delivered the box to it; and that they should find for him against the Cincinnati, New Orleans & Texas Pacific Railway Company, unless they believed from the evidence that the Southern Railway Company had not delivered the box to the Cincinnati, New Orleans & Texas Pacific Railway.

2. The court should not have instructed the jury peremptorily to find for the Cincinnati, New Orleans & Texas Pacific Railway Company. It had in writing receipted for seven boxes. It had in writing acknowledged that one box was missing. While these writings were not conclusive upon it, they made out a *prima facie* case, and the credibility of the testimony explaining them away was for the jury. The agent at Lexington received no waybill for these goods. The agent at Danville seems to have received two waybills which did not agree. The delay in getting the goods from Lexington to Danville is not fully explained. It is the province of the jury to determine from all the evidence whether the box was delivered to the Southern Railway at Knoxville, and, if it was, whether it was lost there or after the car reached the Cincinnati, New Orleans & Texas Pacific Railway Company.

3. The plaintiff offered to read in evidence the writing given him at Danville, and to prove that the agent there told him that one box was missing, and that it would be along in a few days. The agent was the representative of the railway company to deliver the freight, and what he said in delivering it, or as an excuse for not delivering it, is competent against the company. The weight of the evidence is for the jury. It should not have been excluded by the court. The plaintiff should also be allowed to read to the jury the bill of lading received by him at Knoxville and the waybills which went with the freight. The

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writings are written documents made by the defendants, and are competent against them. While they are not conclusive, the credibility of the evidence explaining them on behalf of the defendants is for the jury. When a paper is shown to be in the possession of the defendant, the plaintiff should, before the trial begins, notify the defendant to produce it on the trial, or procure a rule for the production of the paper. If the paper is not then produced, or is shown to be lost, secondary evidence of its contents may be given. In this case there was no notice before the trial for the production of the papers, and no rule, so the court did not err in refusing to require the production of the papers by the defendant.

4. The plaintiff testified that the articles in the box were rugs of certain sorts and dimensions, of good quality and of certain value. He then introduced two witnesses who had dealt in such rugs, and testified they knew their value, and proposed to prove by them that rugs of the size and sort described by plaintiff of good quality were of the value claimed. The evidence was rejected, on the ground that the witnesses had not seen the rugs and did not know their quality. The dimensions, description, and quality of the rugs being shown, it still remained to show their value. One witness may show the dimensions of the rugs, another their quality, a third their description, and a fourth, who is an expert, may testify what the things thus described are worth in the market. Expert testimony is not confined to opinions as to what the witness has seen, but is oftener given as to matters described to the witness. If expert testimony as to the value of lost articles were confined to persons who had seen them, the jury might be often misled, for the persons who have seen them may be much mistaken as to their value, although entirely accurate as to what the things are. The evidence here offered, while not of great weight as the case stood, should have been admitted, as it served to establish a material fact in the case. The plaintiff should also have been allowed to prove that the goods he claimed could be packed in a box of the size of the one in controversy. The defendants had given evidence that the goods could not be put in such a box, and he should have been allowed to prove by himself and two other witnesses that he had packed in their presence goods of the same description and amount as those in controversy in a similar box.

5. The testimony of George Alexander and wife was properly rejected. They only testified to seeing the plaintiff at the St. Louis fair in possession of oriental goods similar to those said to be in the box, but they do not show that he then owned the goods. On the contrary, their evidence shows he was only a salesman selling the goods for another person. The law requires the best evidence, and the mere fact that he was in possession of such goods at St. Louis proves nothing material to the case.

6. Mussellam should have been allowed, while testifying in chief, to state where he had lived, and what business he had followed, so as to give the jury a better idea of who the witness

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was, and what weight should be attached to the opinion evidence which he gave. He should also have been allowed, while on the stand in rebuttal, to tell what took place between him and the driver when the goods were taken to the station, in so far as the driver had testified to any statements then made by him. He offered to testify that he did not tell the driver to leave one of the boxes in the wagon, and, as the driver had testified to this for the defendant, he should have been allowed to testify that he did not make the statement attributed to him by the driver.

7. The defendants should be allowed to prove that, when a car was shipped through, the waybill at Harriman was made out from the waybill which accompanies the car, and not from an inspection of the contents of the car where the car was sealed. This evidence would serve to explain how it was that the Cincinnati, New Orleans & Texas Pacific Railway receipted for seven boxes. In the same manner, proof was properly allowed as to how and under what circumstances the receipt for seven boxes was made out at Knoxville.

8. The weight of the evidence sustains the verdict of the jury in favor of the defendant; but, in view of the whole record, we conclude that the plaintiff did not have a fair trial before the jury on the merits of his case, and that, as he is entitled to a jury trial and a fair trial, a new trial should be awarded. We see no reason for disturbing the action of the circuit court in granting a new trial after the first trial of the case. Circuit courts have a wide discretion as to new trials, and much greater effect is given to the order of the circuit court granting a new trial than to one refusing a new trial, for the reason that he is upon the ground, and that, when he concludes that the ends of justice require a new trial, this court will not interfere with his discretion, unless it is palpably abused.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

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**Cross References to Preceding Authorities Contained in This Series.**

**Burden of Proving Liability of Carrier Where Contract Limits Its Liability.**—See extensive note appended to *Newberger Cotton Co. v. Illinois Cent. R. Co.* (Miss.), 10 Am. & Eng. R. Cas., N. S., 334; foot-note appended to *Louisville & N. R. Co. v. Dunlap* (Ala.), 24 R. R. R. 453, 47 Am. & Eng. R. Cas., N. S., 453; foot-notes appended to *St. Louis, etc., R. Co. v. Wells* (Ark.), 22 R. R. R. 774, 45 Am. & Eng. R. Cas., N. S., 774.

**Burden of Proving Shipper's Assent to Contract of Shipment.**—See foot-notes appended to *Baltimore & O. R. Co. v. Whitehill* (Md.), 22 R. R. R. 176, 45 Am. & Eng. R. Cas., N. S., 176.

**Burden of Proving That Negligence of Carrier Was Cause of Injuries Sustained by Live Stock While in Transit and in Shipper's Charge.**—See note, 18 Am. & Eng. R. Cas., N. S., 424, et seq.; foot-notes appended to *Cleve v. Chicago, etc., Ry. Co.* (Neb.), 21 R. R. R. 189, 44 Am. & Eng. R. Cas., N. S., 189.

**Burden on Carrier to Prove Cause of Injury Sustained by Live Stock While in Transit.**—See note, 18 Am. & Eng. R. Cas., N. S., 423, et seq.

**Connecting Carriers—Presumption That Injury to Freight Occurred on Last Line.**—See note appended to *Moore v. New York, etc., R. Co.* (Mass.), 14 Am. & Eng. R. Cas., N. S., 210; foot-notes appended to *Norfolk & W. Ry. Co. v. Wilkinson* (Va.), 23 R. R. R. 290, 46 Am. & Eng. R. Cas., N. S., 290; foot-notes appended to *Adams Express Co. v. Walker* (Ky.), 24 R. R. R. 145, 47 Am. & Eng. R. Cas., N. S., 145.

**Delay—Carrier's Burden of Showing Excuse for.**—See foot-note ap-



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pendent to *Tiller & Smith v. Chicago, B. & Q. Ry. Co.* (Iowa), 24 R. R. R. 581, 47 Am. & Eng. R. Cas., N. S., 581.

## I. PLAINTIFF'S BURDEN OF PROOF.

## 1. Delivery to Carrier.

In an action against a common carrier for loss of or injury to freight, plaintiff must, in the first instance, show that it was delivered to the carrier.

**United States.**—*United States v. Pacific Express Co.* (D. C.), 15 Fed. Rep. 867; *Manning v. Hoover* (U. S.), Fed. Cas. No. 9,044; *The Willie D. Sandhoval*, 92 Fed. Rep. 286.

**Alabama.**—*Louisville & N. R. Co. v. Echols*, 97 Ala. 556, 12 So. 304.

**California.**—*Ringgold v. Haven*, 1 Cal. 108.

**Florida.**—*Savannah, etc., Ry. Co. v. Harris*, 26 Fla. 148, 7 So. 544, 42 Am. & Eng. R. Cas. 457.

**Georgia.**—*Ocean Steamship Co. v. Wilder*, 107 Ga. 220, 33 S. E. 179; *Southern R. Co. v. Allison*, 115 Ga. 635.

**Indiana.**—*Fitzgerald v. Adams Express Co.*, 24 Ind. 447.

**Michigan.**—*Bonfiglio v. Lake Shore, etc., R. Co.*, 125 Mich. 476; *Marquette, etc., R. Co. v. Kirkwood*, 45 Mich. 51, 7 N. W. 209.

**Minnesota.**—*Boehl v. Chicago, M. & St. Paul Ry. Co.*, 44 Minn. 191, 46 N. W. 333.

**New York.**—*Abrams v. Platt*, 23 N. Y. Misc. Rep. 637; *Canfield v. Baltimore & O. R. Co.*, 46 N. Y. Sup. Ct. Rep. 238; *Jean, Garrison & Co. v. Flagg*, 45 N. Y. Misc. Rep. 421.

**South Carolina.**—*Hipp v. Southern R. Co.*, 50 S. Car. 129, 27 S. E. 623.

**Tennessee.**—*Illinois Cent. R. Co. v. Southern, etc., Co.*, 104 Tenn. 568, 58 S. W. 303.

The burden of proving that the freight was received by the carrier for shipment, is on the shipper, and failing to establish such receipt, he cannot recover against the carrier for the value of goods alleged to have been delivered to the latter. So held in *Louisville & N. Ry. Co. v. Echols*, 97 Ala. 556, 12 So. 304.

**Essential to Existence of Contract.**—In absence of proof that goods were delivered to defendant carrier, or delivered in good condition, any presumption that it received them goes behind its duty and enters into the origin of the contract for carriage, since there is nothing for the contract to act upon until the goods come into the carrier's charge and until that is proved, the contract is not. So held in *Marquette, etc., R. Co. v. Kirkwood*, 45 Mich. 51, 7 N. W. 209.

**Receipt of Goods—Failure to Deny Except by Way of Answer.**—As it is within the power of a railroad company to ascertain whether or not it had received goods for shipment, it is presumed to have ascertained that fact; and its failure to deny, except by way of answer to the complaint, that the goods were so delivered, is evidence of some weight that it had received them. So held in *Union Pac. Ry. Co. v. Hepner*, 3 Colo. App. 313, 33 Pac. 72.

**Failure to Receive Goods—Plea as Admission of Non-Delivery to Consignee.**—When in an action against a railroad, as a common carrier, for non-delivery of goods to a consignee, it pleads, only, that it never received the goods, this is an admission of the non-delivery to the consignee, and proof of the non-delivery to the consignee is not necessary to entitle the plaintiff to a judgment. So held in *Hot Springs R. Co. v. Hudgins*, 42 Ark. 485, 18 Am. & Eng. R. Cas., 643.

**Only Portion of Freight Delivered—Presumption.**—Where a lot of goods were shipped together and embraced in the same way-bill, and part of them were delivered to the consignee and part not, the presumption is that the entire lot were received by the carrier. So held in *Union Pac. Ry. Co. v. Hepner*, 3 Colo. App. 313, 33 Pac. 72.

**Express Wagon Needed—Placard Exposed by Regular Customer—Goods Delivered to Stranger—Company's Name on Hat Shield.**—In *Abrams v. Platt*, 23 N. Y. Misc. Rep. 637, it appeared that plaintiff was a regular customer of defendant express company, and furnished

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with a placard which he exposed when he wished an express wagon to call and also a book of blank receipts; that after plaintiff had exhibited his placard on a certain day, a stranger, who had the name of the express company inscribed on a shield on his cap, came into the store, while there was, on the other side of the street "a sort of yellow wagon" on which defendant's name appeared, signed a receipt and took away the goods. It did not appear that he came from or returned to such wagon; nor was it shown who owned the wagon. Defendant repudiated the whole transaction, including the name of the alleged agent as signed in the book. It was held, that plaintiff had not sustained its burden of proving delivery of the freight to defendant.

**Burden of Establishing Theory of Complaint.**—In *Burrill v. Armstrong* (C. A.), 101 Fed. Rep. 600, it is held that where the theory of the complaint in an action against the owner of a steamship for damage to freight resulting from fire is that the fire originated from an overheated flue, the burden is on complainant to establish that the flue was overheated, and that the fire originated therefrom.

Where the shipper bases his action solely upon negligence of the carrier, and by his instructions submits that question to the jury, the burden is upon him to show such negligence and that it was the proximate cause of the damage sustained. So held in *Ficklin v. Wabash R. Co.*, 117 Mo. App. 211, 93 S. W. 847.

**Specific Acts of Negligence Alleged.**—In *Boehl v. Chicago, M. & St. Paul Ry. Co.*, 44 Minn. 191, 46 N. W. 333, it is held that the burden rests upon the owner of goods lost or injured during transportation to make out a prima facie case of negligence; that this may ordinarily be done by proving the delivery of the goods to the carrier, and the fact of the loss or damage happening during the transit; that the burden then rests upon the carrier to show that such loss or injury was not occasioned by its negligence or default; and that when specific acts of negligence are alleged to have caused the injury, as the "bumping" or collision of cars, the owner of the goods alleged to have been injured thereby must establish such facts by a preponderance of evidence, and this unexplained, will make out a prima facie case of negligence; and that it will then devolve on the carrier, controlling the agencies and instrumentalities through which the accident or injury occurred, to disprove its negligence, to show that the injury was occasioned without its fault.

## 2. Delivery to Carrier in Good Condition.

He must also introduce evidence tending to prove that it was in an undamaged condition when received by the carrier and was in a damaged condition when delivered to the consignee.

**United States.**—*The Vincenzo* (U. S.), 10 Ben. 228; Fed. Cas. 16, 948.

**Connecticut.**—*Mears v. New York, etc., R. Co.*, 75 Conn. 171, 52 Atl. 610.

**Illinois.**—*Chicago & Alton R. Co. v. Benjamin*, 63 Ill. 283.

**Maine.**—*Little v. Boston, etc., Co.*, 66 Me. 239.

**Michigan.**—*Marquette, etc., R. Co. v. Kirkwood*, 45 Mich. 51, 7 N. W. 209; *Marquette, etc., R. Co. v. Langton*, 32 Mich. 251.

**New York.**—*Brooks v. Dinsmore*, 6 N. Y. St. Rep. 281; *Hirsch v. Hudson River Line*, 26 N. Y. Misc. Rep. 823; *Smith v. New York Cent. R. Co.*, 43 Barb. (N. Y.), 225; *Thyll v. New York, etc., R. Co.* (N. Y. Sup. Ct.), 84 N. Y. Supp. 175.

**Oregon.**—*Goodman v. Oregon R. & N. Co.*, 22 Ore. 14, 28 Pac. 894.

**Texas.**—*Bath v. Huston, etc., R. Co.* (Tex. Civ. App.), 78 S. W. 993; *Missouri Pac. R. Co. v. Breeding* (Tex.), 16 S. W. 184; *Texas, etc., R. Co. v. Capper* (Tex. Civ. App.), 84 S. W. 694.

**Presumption of Good Condition Created by Circumstantial Evidence.**—The owner of goods suing a common carrier for injury to the goods through negligence must give evidence sufficient to show that they were in a good condition when delivered to defendant. This

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may be shown by proof of facts and circumstances from which the presumption of facts arises that that they were in a proper condition when defendant received them. So held in *Smith v. New York Cent. R. Co.*, 43 Barb. (N. Y.) 225.

**Burden on Plaintiff to Show Goods Were Abstracted from Packages While in Carrier's Possession.**—In an action against a common carrier to recover for goods alleged to have been abstracted from packages delivered to it for transportation, which packages were duly delivered to the consignee, the burden is upon plaintiff to show that the goods were abstracted while the packages were in the carrier's possession, and before delivery at their destination; and it is not sufficient to show a state of facts as consistent with the occurrence of the loss after as before such delivery. So held in *Hirsch v. Hudson River Line*, 26 N. Y. Misc. Rep. 823.

**Particular Circumstances of Loss or Injury.**—But in an action against a carrier of freight, the failure to carry safely is itself, *prima facie*, a sufficient cause of action, and plaintiff is not required to allege or prove the particular circumstances of the loss or injury. So held in *Chesapeake & Ohio R. Co. v. Radbourne*, 52 Ill. App. 203.

**Leakage of Coal Oil after Being Unloaded from Carrier's Cars.**—And though the burden was on the consignee to prove loss of coal oil by leakage through the carrier's negligence while in the custody of a railroad company, as a common carrier, after it was unladen from its cars to await transportation to its destination, it was not required to prove it to a mathematical certainty, but simply to such degree as would be sufficient to satisfy the minds of the jury as to such fact. So held in *Baltimore & O. R. Co. v. Schumacher*, 29 Md. 168.

**Failure of Consignee to Examine Goods within Reasonable Time.**—A consignee who does not examine goods delivered to him by a carrier within a reasonable time thereafter, cannot recover against the carrier by showing that they were in a damaged condition when he examined them, but he must further show that the injury did not occur after their delivery by the carrier. So held in *Nave v. Pacific Express Co.*, 19 Mo. App. 563.

**Sufficient Vis Major Shown by Plaintiff.**—In an action against a common carrier for loss of goods intrusted to it for carriage, if the plaintiff shows such loss and a vis major sufficient to account for the loss, there is no presumption that the negligence of the carrier was the proximate cause of the loss. *Davis v. Wabash, etc., Ry. Co.*, 13 Mo. App. 449.

### 3. Goods Delivered by Carrier in Damaged Condition—Presumption as to Their Condition When Received by Carrier.

On this question there is a decided conflict between the authorities, some of them supporting the doctrine that it must be presumed, in the absence of evidence on the subject, that the freight was delivered to the carrier in the same condition as that in which it was delivered by it to the consignee.

**United States.**—*Ceballos v. The Warren Adams* (C. C. A.), 74 Fed. Rep. 413; *Choote v. Croninshield* (C. C.), Fed. Cas. No. 2,691; *Kerr v. The Norman* (D. C.), Fed. Cas. No. 7,732; *Rodocanachi v. The Oregon* (D. C.), Fed. Cas. No. 13,178; *Soule v. Rodocanachi* (D. C.), Fed. Cas. No. 13,178; *The Martha* (D. C.), Fed. Cas. No. 9,145; *The Williams Taber Co.* (D. C.), Fed. Cas. No. 17,757.

**Alabama.**—*Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387; *South, etc., R. Co. v. Henlein & Barr*, 52 Ala. 606; *Steele & Burgess v. Townsend*, 37 Ala. 247.

**Connecticut.**—*Mears v. New York, etc., R. Co.*, 75 Conn. 171, 52 Atl. 610.

**Florida.**—*Savannah, etc., Ry. Co. v. Harris*, 26 Fla. 148, 7 So. 544, 42 Am. Eng. R. Cas. 457.

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**Illinois.**—Baltimore & Ohio S. W. R. Co. *v.* Fox, 113 Ill. App. 180; Chesapeake & Ohio R. Co. *v.* Radbourne, 52 Ill. App. 203.

**Iowa.**—Grieve *v.* Illinois Cent. Ry. Co., 104 Iowa, 659, 74 N. W. 192; McCoy *v.* K. & D. M. R. Co., 44 Iowa 424; Powers *v.* Chicago, R. I. & P. Ry. Co. (Iowa), 105 N. W. 345; Winne *v.* Illinois Cent. R. Co., 31 Iowa 583.

**Louisiana.**—Tardos *v.* Ship Toulon, 14 La. Ann. 429.

**Minnesota.**—Boehl *v.* Chicago, M. & St. Paul Ry. Co., 44 Minn. 191, 46 N. W. 333.

**Missouri.**—Buddy *v.* Wabash, etc., Ry. Co., 20 Mo. App. 206; Davis *v.* Wabash, etc., Ry. Co., 13 Mo. App. 449; Doan *v.* St. Louis, etc., Ry. Co., 38 Mo. App. 408; Nave *v.* Pacific Express Co., 19 Mo. App. 563; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199.

**New York.**—Brooks *v.* Dinsmore, 6 N. Y. St. Rep. 281; Caldwell *v.* Erie Transfer Co., 13 N. Y. Misc. Rep. 37; Hoffberg *v.* Bumford (N. Y. Sup. Ct.), 88 N. Y. Supp. 940; Smith *v.* New York Cent. R. Co., 43 Barb. (N. Y.) 225.

**Pennsylvania.**—Adams Express Co. *v.* Holmes (Pa.), 9 Atl. 166; American Express Co. *v.* Sands, 55 Pa. St. 140; Buck *v.* Pennsylvania R. Co., 150 Pa. St. 170, 24 Atl. 678; Hays *v.* Kennedy, 3 Grant (Pa.) 351.

**Tennessee.**—Louisville & N. R. Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. 311; Merchants' Dispatch Transp. Co. *v.* Bloch Bros., 86 Tenn. 392, 6 S. W. 881.

**Texas.**—Missouri Pac. Ry. Co. *v.* Breeding (Tex.), 16 S. W. 184; Southern Pac. Ry. Co. *v.* D'Arcais, 27 Tex. Civ. App. Rep. 57.

**In Safe Hands after Delivery.**—There is, as a general rule, no presumption that goods were delivered to a carrier in good condition, nor that they remained in safe hands after their delivery by the carrier. So held in Brooks *v.* Dinsmore, 3 N. Y. St. Rep. 587.

**Machine Broken.**—In an action against a railroad for negligently breaking a machine in transit, unless it is shown that it was delivered to defendant or some connecting line in good condition, the presumption is that it was delivered to the consignee in the same condition in which it was received by the carrier for shipment. So held in Missouri Pac. Ry. Co. *v.* Breeding (Tex.), 16 S. W. 184.

**Wet Hay—Condition at Distant Port.**—In an action against a railroad company for negligence in carrying hay, whereby it was wet and damaged, it is essential for plaintiff to show the condition of the hay when delivered to the company; and evidence of its condition at a distant port from which it was shipped by vessel to the place of delivery to defendant could only be resorted to in the absence of more direct proof. So held in Marquette, etc., R. Co. *v.* Langton, 32 Mich. 251.

**Bill of Lading Endorsed "Weight and Contents Unknown."**—In Wentworth *v.* Ship Realm, 16 La. Ann. 18, it appeared that a shipper took a bill of lading with the endorsement upon the margin "weight and contents unknown," and on the arrival of the vessel at New Orleans the freight was condemned by the Port Warden to be sold as damaged goods. It was held that, under such bill of lading, the common carrier has complied with its contract when it has delivered the box containing the goods externally in good order and condition, and the burden of proof rests upon the consignee to show that the contents of the box were in good order and condition at the time of the shipment.

**Contrary View.**—But it has been held that when a common carrier delivers goods to the consignee in a damaged condition, it must prove, in order to exonerate itself, that they were in such condition when delivered to it by the consignor. Breed *v.* Mitchell, 48 Ga. 533; Henry *v.* Central R. & B. Co., 89 Ga. 815, 15 S. E. 757.

**Failure to Show Goods Were Received by Carrier in Bad Condition.**—Where it does not appear either that the carrier received the

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goods as in bad order or that they were in fact in bad order when received, the presumption is they were in good order. So held in *Henry v. Central R. & B. Co.*, 89 Ga. 815, 15 S. E. 757.

#### 4. Condition of Freight When Received by Each Connecting Carrier—Presumption.

The presumption is that each of several connecting carriers received the freight in the same condition as that in which it was delivered to the initial carrier for transportation.

**Alabama.**—*Southern Express Co. v. Hess*, 53 Ala. 19.

**Arkansas.**—*St. Louis, etc., R. Co. v. Coolidge* (Ark), 83 S. W. 333, 334.

**Florida.**—*Savannah, etc., R. Co. v. Harris*, 26 Fla. 148, 7 So. 544, 42 Am. & Eng. R. Cas. 457.

**Georgia.**—*Central R., etc., Co. v. Bayer*, 91 Ga. 115, 16 S. E. 933; *Evans v. Atlantic, etc., R. Co.*, 56 Ga. 498; *Forrester v. Georgia R., etc., Co.*, 92 (Ga.) 699, 19 S. E. 811; *Paramere v. Western R. Co.*, 53 Ga. 383.

**Illinois.**—*Great Western R. Co. v. McDonald*, 18 Ill. 172; *Lake Erie, etc., R. Co. v. Oakes*, 11 Ill. App. 489.

**Indian Territory.**—*Gulf, etc., R. Co. v. Jones* (Ind. Ter.), 37 S. W. 208.

**Iowa.**—*Beard v. Illinois Cent. R. Co.*, 79 Iowa 518, 44 N. W. 800.

**Massachusetts.**—*Bullock v. Haverhill, etc., Co.*, 107 Mass. 91; *Cote v. New York, etc., R. Co.*, 182 Mass. 290.

**Minnesota.**—*Leo v. St. Paul Co.*, 30 Minn. 438, 15 N. W. 872.

**Mississippi.**—*Mobile, etc., R. Co. v. Tupelo, etc., Mfg. Co.*, 67 Miss. 35, 7 So. 279.

**Missouri.**—*Flynn v. St. Louis, etc., R. Co.*, 43 Mo. App. 424.

**New York.**—*Hunt v. Michigan, etc., R. Co.*, 37 N. Y. 162; *Myerson v. Wallverton*, 9 N. Y. Misc. Rep. 186; *Smith v. New York Cent. R. Co.*, 41 N. Y. 620.

**North Carolina.**—*Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.* (N. Car.), 38 S. E. 894; *Knott v. Raleigh, etc., R. Co.*, 98 (N. Car.) 73, 3 S. E. 735; *Lindley v. Richmond, etc., R. Co.*, 88 N. Car. 547; *Morganton Mfg. Co. v. Ohio, etc., R. Co.*, 121 (N. Car.) 514, 28 S. E. 474.

**Tennessee.**—*Louisville, etc., R. Co. v. Tenn. Brewing Co.*, 96 Tenn. 677, 36 S. W. 392; *Memphis, etc., R. Co. v. Hollway*, 9 Baxt. (Tenn.) 188.

**Texas.**—*Gulf, etc., R. Co. v. Cushney*, 95 Tex. 309; *Gulf, etc., R. Co. v. Pitts* (Tex. Civ. App.), 83 S. W. 727; *Houston, etc., R. Co. v. Ney* (Tex. Civ. App.), 58 S. W. 43; *Missouri, etc., R. Co. v. Clayton* (Tex. Civ. App.), 84 S. W. 1069; *Missouri, etc., R. Co. v. Mazzie*, 29 Tex. Civ. App. 295; *St. Louis, etc., R. Co. v. Cohen* (Tex. Civ. App.), 55 S. W. 1123; *Texas, etc., R. Co. v. Adams*, 78 Tex. 372, 14 S. W. 666; *Texas, etc., R. Co. v. Capper* (Tex. Civ. App.), 84 S. W. 694.

**Wisconsin.**—*Laughlin v. Chicago, etc., R. Co.*, 28 Wis. 204.

In an action against a railroad, as a common carrier, for injury to live stock, it must be affirmatively shown that the injury was sustained during the time the animals were in defendant's custody, where its liability was limited to damage occurring on its own line. (Tex. Civ. App.), 33 S. W. 748.

**Baggage Delivered to Railroad Company in Good Condition—Transfer Company's Burden of Proof.**—Proof that baggage was delivered in good condition to the railroad company from which a transfer company received it upon presenting the passenger's check is sufficient to throw upon the transfer company the burden of showing that it was received by it in a damaged condition. So held in *Myerson v. Wollverton*, 9 N. Y. Misc. Rep. 186.

**Deficiency in Quantity of Freight Delivered by Terminal Carrier—Mere Presumption of Fact.**—But the rule that a connecting carrier which has completed the carriage and delivery of freight, deficient



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in quantity, to the consignee will be held liable for the deficiency, without proof that it was occasioned by its fault, creates a mere presumption of fact, which should not be charged where there was evidence tending to rebut it. So held in *Bibb v. Missouri, etc., Ry. Co.* (Tex. Civ. App.), 84 S. W. 663.

### 5. Bill of Lading Not Conclusive as to Condition of Freight.

As a general rule, the plaintiff, in an action against a carrier for damage to freight, makes out a prima facie case by producing the receipt of the carrier acknowledging that the freight was delivered to the carrier in good order, but such an acknowledgment is a mere recital and not conclusive.

**United States.**—*Choate v. Croninshield* (C. C.), Fed. Cas. No. 2,691; *Cunard Steamship Co. v. Kelley* (C. C.), 115 Fed. Rep. 678; *Moravian* (D. C.), Fed. Cas. No. 9,789; *The California* (D. C.), Fed. Cas. No. 2,314; *The Colombo* (C. C.), Fed. Cas. No. 3,040; *The Martha* (D. C.), Fed. Cas. No. 9,145; *Seller v. The Pacific* (D. C.), Fed. Cas. No. 12,644; *Turner v. The Black Warrior* (C. C.), Fed. Cas. No. 14,253.

**Connecticut.**—*Mears v. New York, etc., R. Co.*, 75 (Conn.) 71, 52 Atl. 610.

**Louisiana.**—*Lengsfeld v. Jones*, 11 La. Ann. 624.

**Maine.**—*Tarbox v. Eastern Steamboat Co.*, 50 Me. 339.

**Mississippi.**—*Gardner v. New Orleans*, 8 N. E. R. Co., 78 Miss. 640.

**New York.**—*Harnett v. Westcot*, 56 N. Y. Sup. Ct. 213; *Jean, Garrison & Co. v. Flagg*, 45 N. Y. Misc. Rep. 421; *Thyll v. New York, etc., R. Co.* (N. Y. Sup. Ct.), 84 N. Y. Supp. 175.

**North Carolina.**—*Burwell v. Raleigh & Gaston R. Co.*, 94 N. Car. 451, 25 Am. & Eng. R. Cas. 410.

**Oregon.**—*Seller v. Steamship Pacific*, 1 Ore. 409.

**South Carolina.**—*Stadlecker v. Combs*, 9 Rich. (S. Car.), 193.

**Texas.**—*Gulf, etc., Ry. Co. v. Holder & Co.*, 10 Tex. Civ. App. 223, 30 S. W. 383.

**"Receiver in Good Condition"—Recitals of Bill of Lading.**—Recitals in a bill of lading that the freight was received in good condition are prima facie evidence of such fact. So held in *Gardner v. New Orleans & N. E. R. Co.*, 78 Miss. 640.

**"Received in Good Order."**—In an action against a common carrier, the libellant makes a prima facie case by producing the receipt of the carrier—"Received in good order," but this word may be explained or contradicted by the carrier. So held in *Seller v. The Pacific* (D. C.), Fed. Cas. No. 12,644.

**Not Conclusive.**—In an action against a common carrier for injury to property while in transit, the bill of lading and manifest, showing that the property was received by the carrier in good order, is prima facie evidence against the defendant, but is not conclusive, and may be rebutted. So held in *Burwell v. Raleigh & Gaston R. Co.*, 94 N. Car. 451, 25 Am. & Eng. R. Cas. 410.

**Shipped in Good Order—Prima Facie Presumption Created.**—In *Choate v. Croninshield* (C. C.), Fed. Cas. No. 2,691, it is held that the legal effect of a bill of lading affirming the goods to have been shipped in good order is to raise a prima facie presumption that in all particulars open to inspection the goods were in that condition; but this does not prevent the carrier, in case of loss or damage, from showing that the loss proceeded from some cause which existed, but was not apparent, at the time it received the goods for transportation.

**"To Be Delivered in Good Order" to Consignee.**—A bill of lading signed by the carrier acknowledging the receipt of the goods, "to be delivered in good order to A. at B.," is prima facie evidence that they were in good condition when received by the carrier, but is not conclusive, and the carrier may prove that the goods were damaged before they came into its possession. In such case, the burden is on the carrier to prove such fact. So held in *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339.



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**Good Order of Cotton Shown by Carrier's Receipt**—Where the carrier's receipt for cotton states that it is not in bad order, and it is delivered to the consignee in a damaged condition, it must be presumed that the cotton suffered the injury while under the control of the carrier, and in such case there is no requirement that the owner should prove aliunde that the cotton was not damaged when the consignee received it. So held in *L. & G. A. Ry. Co. v. Blanton, Nunually & Co.*, 63 Tex. 109.

**Received in Apparent Good Order—Only External Inspection Possible.**—But the rule that the recital in a bill of lading that the goods were received in apparent good order makes a prima facie case against the carrier, if they are afterwards delivered in an injured condition, does not apply where the articles are so shipped as to be subject only to external inspection; and, in such case, one suing the carrier for injury to the goods claimed to have occurred in transit, though the boxes containing the goods were delivered in apparent good order, has the burden of proving that the articles were not injured when delivered to the carrier. So held in *Gulf, etc., Ry. Co. v. Holder & Co.*, 10 Tex. Civ. App. 223, 30 S. W. 383.

**Five Cases of Merchandise "Shipped in Apparent Good Order."**—The admission in a bill of lading, "shipped in apparent good order and condition five cases of merchandise, value and contents unknown," has reference to the external condition of such cases, and it excludes the inference that the carrier thereby admits anything as to the quantity or quality of the contents of the cases at the time of delivery, beyond what is visible to the eye or apparent from handling the same. *The California (D. C.)*, Fed. Cas. No. 2,314.

**Evidence Only of Good External Condition of Cases of Sewing Machines.**—A bill of lading, reciting, "two cases sewing machines shipped in good order and condition, quantity, condition and contents unknown, not accountable for breakage;" is evidence only of the good external condition of the cases when received by the carrier, and casts the burden on the owner to prove that an injury to the machines resulted from the negligence of the carrier. So held in *The Moravian (D. C.)*, Fed. Cas. No. 9,789.

**"One Piano, Boxed, Received in Apparent Good Order."**—A shipping receipt for "one piano, boxed, received in apparent good order (contents and condition of package unknown)," does not raise any presumption, as matter of law, that the piano itself was in good condition when delivered to the carrier. So held in *Mears v. New York, etc., R. Co.*, 75 Conn. 171, 52 Atl. 610.

#### 6. Burden of Proving Carrier's Negligence Was Proximate Cause.

After the carrier has shown in defense that the cause of the loss of or injury to the freight is one covered by a common-law or contract exemption, the plaintiff must introduce evidence to prove that the proximate or contributing cause of the damage sustained was the carrier's negligence. *Kirk v. Folsom*, 23 La. Ann. 584; *Jones v. Minneapolis & St. Louis R. Co.*, 91 Minn. 229, 97 N. W. 893; *Lambert v. Benner*, 31 N. Y. Sup. Ct. Rep. 665.

**Loss from Overpowering Cause—Concurring Negligence of Carrier.**—When it is shown that loss of freight was due to an overpowering cause, the burden is on the plaintiff to establish that negligence on the part of the carrier concurred in or contributed to the loss. So held in *Jones v. Minneapolis & St. Louis R. Co.*, 91 Minn. 229, 97 N. W. 893.

**Leakage of Wine—Proof of Inferior Quality of Casks.**—In an action against a common carrier, proof of the inferior quality of casks in which wine was delivered to the carrier for transportation threw on plaintiffs the burden of showing that injury to the casks was caused by the negligence of the vessel; and the burden was also on them of proving the leakage on account of which the action was brought was greater than the average from such casks. So held in *Six Hundred and Thirty Casks of Sherry (C. C.)*, Fed. Cas. No. 12,918.

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**Butter Damaged—Unsuitable Place of Storage.**—Where the shipper made a prima facie case by showing the shipment of the damaged butter in good order, it became necessary for the carrier to show that the butter had been stowed on board the vessel in a suitable place. And that being shown, the burden of proof was changed, and the shippers were required to show either that the place of storage was not suitable, or not the most suitable place in the ship. So held in *Lambert v. Benner*, 31 N. Y. Sup'r Ct. Rep. 665.

**Accident to Boat from Fault of Carrier.**—If goods which had been shipped in good order have been lost on the voyage it devolves on the carrier to show that the loss was occasioned by accident and uncontrollable events, which if established, shifts the burden on the shipper, before he can hold the carrier liable, of showing that the accident to the boat by which the goods were lost resulted from the fault of the carrier. So held in *Kirk v. Folsom*, 23 La. Ann. 584.

**Burden of Proof Shifted by Oral Testimony—Instruction Properly Refused.**—But when the carrier has adduced evidence rebutting the prima facie presumption of negligence, which arises from the proof of injury while the goods are still in its possession, but the rebutting evidence consists of the oral testimony of witnesses, the sufficiency and credibility of which are matters for the determination of the jury, a charge which asserts that the burden of proof is thereby shifted to the plaintiff is properly refused, because calculated to confuse and mislead the jury. So held in *Western Railway Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

## 7. Loss within Exemption Clause—Burden on Shipper to Show Negligence.

After the carrier has shown the loss to have been within the clause of the special contract set up as exempting the carrier from liability, according to what seems to be the better supported doctrine, the carrier is not required to also provide the exercise of due care on its part; and the shipper, in order to prevent the alleged exemption clause from exonerating the carrier, must prove affirmatively that the carrier was guilty of negligence with respect to the shipment.

**United States.**—*Ceballos v. The Warren Adams* (C. C. A.), 74 Fed. Rep. 413; *The Delhi* (D. C.), Fed. Cas. No. 3,770; *The Neptune* (C. C.), Fed. Cas. No. 10,118; *The Olbers* (D. C.), Fed. Cas. No. 10,477; *The Pereire* (D. C.), Fed. Cas. No. 10,477; *The Rockett* (D. C.), Fed. Cas. No. 11,975; *Ullman v. Flintshire* (D. C.), 69 Fed. Rep. 471; *Wertheimer v. Penn. R. Co.* (C. C.), 1 Fed. Rep. 323.

**Arkansas.**—*Little Rock, etc., R. Co. v. Corcoran*, 40 Ark. 375, 18 Am. & Eng. R. Cas. 602; *Little Rock, etc., R. Co. v. Harper*, 44 Ark. 208, 21 Am. & Eng. R. Cas. 97.

**Iowa.**—*Mitchell v. United States Express Co.*, 46 Iowa 214.

**Kansas.**—*Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623.

**Louisiana.**—*New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co.*, 20 La. Ann. 302.

**Maine.**—*Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228.

**Maryland.**—*Bankard v. Baltimore, etc., R. Co.*, 34 Md. 197.

**Missouri.**—*Anderson v. Atchison, etc., Ry. Co.*, 93 Mo. App. 677; *Bushnell v. Wabash R. Co.* (Mo App.), 94 S. W. 1001; *Flynn v. St. Louis, etc., Ry. Co.*, 43 Mo. App. 424; *Harvey v. Terre Haute, etc., R. Co.*, 6 Mo. App. 585; *Heil v. St. Louis, etc., Ry. Co.*, 16 Mo. App. 363; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199.

**New York.**—*Sutro v. Fargo*, 41 N. Y. Sup. Ct. Rep. 231; *Whitworth v. Erie Ry. Co.*, 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349; *Canfield v. Baltimore, etc., R. Co.*, 93 N. Y. 532, 16 Am. & Eng. R. Cas. 152, 45 Am. Rep. 268.

**Pennsylvania.**—*Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, 24 Atl. 678; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577, 13 Atl. 324.

**Tennessee.**—*Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314.

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In all cases where the evidence shows that the loss or damage sued for falls within the limits or conditions expressed by the shipping contract, the burden of proof rests upon the plaintiff to establish the negligence of the carrier, and such negligence will not be presumed from non-delivery or loss of the freight alone. So held in *Mangin v. Dinsmore*, 38 N. Y. Sup'r Ct. Rep. 248.

**Damaged by Wet.**—Where a contract exempts the carrier from liability for damages by wet, the shipper must establish that the carrier negligently permitted the freight to become wet, by proving affirmatively some specific act of negligence as the proximate cause of the injury. So held in *Thyll v. New York, etc., R. Co.* (N. Y. Sup. Ct.), 84 N. Y. Supp. 175.

**Inspection of Car by Shipper—Foot Caught in Crack—Whether Defect Was Patent.**—The shipping contract recited that the shipper had examined the car provided for the transportation of his stock and found it in good order and condition, and stipulated that he accepted the same, and agreed that it was suitable and sufficient for the purpose intended. It was held, upon the trial of an action brought by the shipper against the carrier for damages for the value of one of the animals, alleged in the petition to have died from injuries caused by a defect in the car, consisting of a crack therein in which the animal got its foot, that the burden of proof was upon the plaintiff to show that such defect was not patent when he examined the car, and was therefore not covered by his agreement. *Williams v. Central of Georgia Ry. Co.* (Ga.), 7 R. R. R. 839, 30 Am. & Eng. R. Cas., N. S., 839, 43 S. E. 980.

**Contrary View.**—But in some jurisdictions it is held that after the carrier has sustained its burden of showing that the loss or injury in question was one from which the special contract exempted it, it must also prove that it was not caused by the carrier's negligence.

**Alabama.**—*Alabama Great Southern R. Co. v. Little*, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; *Grey v. Mobile Trade Co.*, 55 Ala. 387; *Louisville, etc., R. Co. v. Gidley*, 119 Ala. 523, 24 So. 753; *Louisville, etc., R. Co. v. Touart*, 97 Ala. 514, 11 So. 756; *McCarthy v. Louisville, etc., R. Co.*, 102 Ala. 193, 14 So. 370; *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 2; *South, etc., R. Co. v. Henlein*, 52 Ala. 606; *Steele v. Townsend*, 37 Ala. 247; *Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596.

**Connecticut.**—*Mears v. New York, etc., R. Co.*, 75 Conn. 171, 52 Atl. 610.

**Georgia.**—*Berry v. Cooper*, 28 Ga. 543; *Central, etc., R. Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838; *Columbus, etc., R. Co. v. Kennedy*, 78 Ga. 646, 3 S. E. 267; *Richmond, etc., R. Co. v. White*, 88 Ga. 805, 15 S. E. 802.

**Illinois.**—*Adams Express Co. v. Stettanus*, 61 Ill. 184.

**Indiana.**—*Pittsburg, etc., R. Co. v. Racer* (Ind. App.), 31 N. E. 853.

**Kentucky.**—*Louisville, etc., R. Co. v. Thompson*, 13 Ky. L. Rep. 973.

**Minnesota.**—*Hinton v. Eastern R. Co.*, 72 Minn. 339, 75 N. W. 373; *Hull v. Chicago, etc., R. Co.*, 41 Minn. 510, 43 N. W. 391; *Shea v. Minneapolis, etc., R. Co.*, 63 Minn. 228, 65 N. W. 458; *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382, 62 N. W. 619.

**Mississippi.**—*Chicago, etc., R. Co. v. Moss*, 60 Miss. 1003; *Newberger Cotton Co. v. Illinois Cent. R. Co.*, 75 Miss. 303, 23 So. 186; *Southern Express Co. v. Seide*, 67 Miss. 609, 7 So. 547.

**North Carolina.**—*Hinkle v. Southern R. Co.* (N. Car.), 36 S. E. 348; *Mitchell v. Carolina Cent. R. Co.*, 124 N. Car. 236, 32 S. E. 671.

**Ohio.**—*Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Fatman v. Cincinnati, etc., R. Co.*, 2 Disney (Ohio) 248; *Gaines v. Union Transp., etc., Co.*, 28 Ohio St. 318; *Graham v. Davis*, 4 Ohio St. 362; *Union Express Co. v. Graham*, 26 Ohio St. 595; *Union Mut. Ins. Co. v. Indianapolis, etc., R. Co.*, 1 Disney (Ohio) 480.

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**South Carolina.**—*Johnstone v. Richmond, etc., R. Co.* (S. Car.), 55, 17 S. E. 512; *Swindler v. Hillard*, 2 Rich. (S. Car.), 286; *Wallingford v. Columbia, etc., R. Co.*, 26 S. Car. 258, 2 S. E. 19.

**Texas.**—*Askew v. Gulf, etc., R. Co.* (Tex. Civ. App.), 73 S. W. 846; *Galveston, etc., R. Co. v. Efron* (Tex. Civ. App.), 38 S. W. 639; *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 (Tex.) 26, 14 S. W. 785; *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13, 23 Am. & Eng. R. Cas. 703; *St. Louis S. W. Ry. Co. v. McIntyre* (Tex. Civ. App.), 82 S. W. 346; *St. Louis, etc., R. Co. v. Martin* (Tex. Civ. App.), 35 S. W. 28; *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 63 S. W. 619.

**West Virginia.**—*Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293; *Brown v. Adams Express Co.*, 15 W. Va. 812.

**Burden of Proving Loss without Fault.**—Where a common carrier claims exemption from responsibility for loss of goods with which it had been intrusted, on the ground that such immunity is secured by special agreement, the burden is on it to prove that the loss was occasioned without its fault. So held in *Union Express Co. v. Graham*, 26 Ohio St. 595.

**Exemption from Dangers of Navigation and Inevitable Accidents.**—In action against a common carrier upon a bill of lading containing an exception of the dangers of the river navigation and inevitable accidents, after non-delivery of the goods is shown, the burden of proof is upon the carrier to show not only that loss was within the terms of the exception, but also that proper care and skill were exercised to prevent it. So held in *Graham v. Davis Co.*, 4 Ohio St. 362.

**Arbitrary Valuation—Theft of Portion—Failure to Show Circumstances of Theft.**—Where household goods were shipped by rail under a special contract, expressed in the bill of lading, whereby the liability of the railroad, in case of loss, was limited to an arbitrary valuation, and a portion of the goods were stolen after arrival at destination, but before the carrier's responsibility as such was terminated, there being no evidence showing how or under what circumstances the theft occurred, presumptively the loss was occasioned by the company's negligence, and it was, therefore, liable for the full value of the goods so lost. Held in *Georgia R. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287.

**"Not Accountable for Rust or Breakage"—Proof of Breakage.**—Where the bill of lading contains an express stipulation, that the carrier is "not accountable for rust or breakage," proof of injury to the goods by breakage nevertheless makes out a prima facie case of negligence against the carrier, and the onus is then on it to show the exercise of due care on its part to prevent the injury, unless the nature of the injury, or of the goods, of itself, furnishes evidence that due care could not have prevented the injury. So held in *Steele v. Townsend*, 37 Ala. 247.

**"Subject to Delay."**—Although a carrier accepted the shipment under a contract, "subject to delay," it has the burden of showing the exercise of due diligence to avoid delay in carrying and delivering the goods. So held in *Parker v. Atlantic Coast Line R. Co.*, 133 N. Car. 335.

**Damage to Track by Flood—Absence of Delay after Repairs.**—Where a railroad company is excusable for delay in the transportation of freight, caused by damage to its track from an unprecedented flood, the burden of proof is, nevertheless, upon it to show due care to transport the goods within a reasonable time after the track is repaired. So held in *Burnham v. Alabama & Vicksburg Ry. Co.*, 81 Miss. 46.

### 8. Fire—Not Liable Except for Negligence.

Where the carrier is exempted from liability for loss or injury by fire except where it resulted from negligence, a presumption of negligence does not arise from the mere fact that the freight was in the possession of the carrier at the time of the fire, and was destroyed by it.

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**United States.**—*Cau v. Texas, etc., R. Co.* (C. C. A.), 113 Fed. Rep. 91; *Charnock v. Texas, etc., R. Co.*, 113 Fed. Rep. 92; *Marande v. Texas, etc., R. Co.*, 102 Fed. Rep. 246.

**Arkansas.**—*Little Rock, etc., R. Co. v. Corcoran*, 40 Ark. 375, 18 Am. & Eng. R. Cas. 602; *Little Rock, etc., Ry. v. Harper*, 44 Ark. 208, 21 Am. & Eng. R. Cas. 97; *Little Rock, etc., Ry. Co. v. Talbot & Co.*, 39 Ark. 523, 18 Am. & Eng. R. Cas. 598; *St. Louis, etc., R. Co. v. Bone*, 52 Ark. 26, 11 S. W. 958.

**California.**—*Wilson v. Southern Pac. R. Co.*, 62 Cal. 164.

**Iowa.**—*Denton v. C. R. I. & P. R. Co.*, 52 Iowa 161, 2 N. W. 1093; *Faust v. Chicago, etc., R. Co.*, 104 Iowa 241, 73 N. W. 623.

**Massachusetts.**—*Cox v. Central Vt. R. Co.*, 170 Mass. 129, 49 N. E. 97.

**Mississippi.**—*Newberger Cotton Co. v. Illinois Cent. R. Co.*, 75 Miss. 303, 23 So. 186; *Yazoo, etc., R. Co. v. Millsaps*, 76 Miss. 855, 25 So. 672.

**Missouri.**—*Standard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258, 26 S. W. 704.

**New York.**—*Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Lamb v. Camden, etc., R. Co.*, 46 N. Y. 271; *Platt v. Richmond, etc., R. Co.*, 108 N. Y. 358, 15 N. E. 393; *Rowan v. Wells*, 80 N. Y. App. Div. 31; *Sutro v. Fargo*, 41 N. Y. Sup. Ct. Rep. 231; *Whitworth v. Erie R. Co.*, 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349.

**Tennessee.**—*Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314.

**Contrary View.**—See *Gulf, etc., R. Co. v. Zimmermana*, 81 Tex. 605, 17 S. W. 239; *Houston, etc., R. Co. v. McFadden* (Tex. Civ. App.), 40 S. W. 216; *St. Louis S. W. R. Co. v. McIntyre* (Tex. Civ. App.), 82 S. W. 346; *Texas, etc., R. Co. v. Payne*, 15 Tex. Civ. App. 58; *Texas, etc., R. Co. v. Richmond*, 94 Tex. 571, 163 S. W. 619.

## 9. Delay.

Under this rule, the burden is upon plaintiff to show unusual delay in transporting or delivering freight. *St. Clair v. Chicago, etc., R. Co.*, 80 Iowa 304, 45 N. W. 570; *Ratliff v. Quincy, etc., Co.* (Mo. App.), 94 S. W. 1005; *Hill v. Syracuse, etc., R. Co.*, 89 N. W. 370; *Mann v. Birchard*, 40 Vt. 326; *Falvey v. Northern Transp. Co.*, 15 Wis. 129.

**Mere Proof of Delay.**—In an action against a railroad company for negligent delay in the shipment of stock of market, a prima facie case of negligence is not made out by mere proof of delay in transportation. So held in *McCrary v. Chicago & A. Ry. Co.* (Mo. App.), 83 S. W. 82.

**Usual Time for Transportation.**—In *Clevele v. Chicago, etc., Ry. Co.* (Neb.), 21 R. R. R. 189, 44 Am. & Eng. R. Cas., N. S. 189, 108 N. W. 982, it is held that, in order to recover for an alleged delay in the shipment of live stock, it is necessary to introduce evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was consumed than was necessary for that purpose.

**Penal Statute.**—In an action against a railroad for the penalty imposed by N. Car. Revisal 1905, § 2632, for a delay in the transportation of goods, the burden of showing that the time for the transportation was unreasonable rests upon plaintiff. So held in *Alexandre v. Atlantic Coast Line R. Co.* (N. Car.), 23 R. R. R. 485, 46 Am. & Eng. R. Cas., N. S., 485, 56 S. E. 691.

## 10. Nondelivery by Carrier—Burden on Plaintiff.

And the burden of showing that the carrier refused or failed to deliver the freight to the consignee also rests upon the plaintiff in such an action.

**United States.**—*The Falcon* (U. S.), 3 Blachf. 64.

**Illinois.**—*Chicago & N. W. Ry. v. Dickinson*, 74 Ill. App. 249; *Woodbury v. Frink*, 14 Ill. 279.



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**Louisiana.**—*Sehneide v. Pennington & Glidden*, 21 La. Ann. 299; *Silverman v. St. Louis, I. M. & So. Ry. Co.*, 51 La. Ann. 1785.

**Maryland.**—Baltimore, etc., *R. Co. v. Schumacher*, 29 Md. 168.

**Mississippi.**—Chicago, etc., *R. Co. v. Provine*, 61 Miss. 288.

**New York.**—*Hirsch v. Hudson River Line (N. Y.)*, 26 Misc. Rep. 823; *Place v. Union Express Co.*, 2 Hilt (N. Y. Com. Pl.) 19; *Roberts v. Chittenden*, 88 N. Y. 33.

**Pennsylvania.**—*Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577, 13 Atl. 324.

**Texas.**—*Southern Pac. R. Co. v. Phillipson (Tex. Civ. App.)*, 39 S. W. 958; *Texas & P. Ry. Co. v. Capper (Tex. Civ. App.)*, 84 S. W. 694.

**Vermont.**—*Day v. Ridley*, 16 Vt. 48.

**Slight Evidence of Sufficient.**—But plaintiff may sustain this burden by introducing slight evidence of such nondelivery. *The Falcon (U. S.)*, 3 Blachf. 64; *Woodbury v. Frink*, 14 Ill. 279; Chicago, etc., *R. Co. v. Provine*, 61 Miss. 288.

In order to charge a carrier for the nondelivery of goods some evidence of their nondelivery must be given, but slight evidence will be sufficient to throw upon the carrier the burden of showing delivery to the consignee. So held in *The Falcon (C. C.)*, Fed. Cas. No. 4,617.

In an action against a carrier, where the loss or nondelivery of freight is alleged, the plaintiff must give some evidence in support of the allegation, notwithstanding its negative character, but slight evidence will sustain such burden of proof. So held in *Chicago & N. W. Ry. Co. v. Dickinson*, 74 Ill. App. 249.

In an action against a carrier for failure to deliver goods shipped, the plaintiff is not bound to show nondelivery by a preponderance of the testimony. Slight evidence of such fact will be sufficient to shift the burden of proof upon the carrier. So held in *Chicago & N. W. Ry. Co. v. Dickinson*, 74 Ill. App. 249.

In actions on contracts of affreightment, slight proof of nondelivery is sufficient to put the burden of showing delivery on the carrier, but there must be some proof by the plaintiff. So held in Chicago, etc., *R. Co. v. Provine*, 61 Miss. 288.

**Delay and Failure of Consignee to Receive Portion of Freight—Burden of Showing When Freight Arrived.**—Proof by a consignee that it did not receive the goods within the time specified for its delivery by the shipping contract, coupled with evidence that a part of them did not arrive, was sufficient evidence of the failure of the carrier to deliver the goods to throw on it the burden of showing when the freight did arrive at the depot; it being a matter peculiarly within the carrier's knowledge, and slight evidence in behalf of plaintiff being sufficient to throw on it the burden of proof. So held in *Place v. Union Express Co.*, 2 Hilt. (N. Y. Com. Pl.), 19.

**Nondelivery to Only One Consignee Shown.**—Where the bill of lading specifies that the goods were to be delivered to L. or Z., in an action against the carrier for nondelivery, it is not enough for the shipper to show nondelivery to L., but he must also give some evidence of nondelivery to Z. So held in *The Falcon (C. C.)*, Fed. Cas. No. 4,617.

# 11. Stock—Loss or Injuries—Must Show Human Agency.

After the carrier has introduced evidence tending to show that the injury to plaintiff's live stock was attributable to the vitality or "proper vice" of the freight, the burden is cast upon the plaintiff to show that the loss or injury was in part due to human agency. *Hussey v. The Saragossa (U. S.)*, 3 Woods, 380; *Griffin v. Wabash Ry. Co.*, 115 Mo. App. 549, 91 S. W. 1015; *Hance v. Pacific Express Co.*, 66 Mo. App. 186, 48 Mo. App. 179; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577, 13 Atl. 324.



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**Damage Attributable to Human Agency.**—In an action against a common carrier for injury to live stock in transit, it is not sufficient for the shipper to show a delivery of the animals to the carrier in good condition, and their delivery to the consignee in a damaged condition, he must also produce evidence tending to show that the damage was attributable to human agency, either causing or concurring to cause the injury. When this is done, the burden is upon the carrier to prove due care and diligence in the carriage of the stock. So held in *Hance v. Pacific Express Co.*, 66 Mo. App. 486.

**Merely Showing Receipt by Carrier in Good Condition and Delivery in Injured Condition.**—As a common carrier is not an insurer against danger arising from the vitality of the freight, it is incumbent upon the shipper to show that such freight was injured by the carrier's negligence; and he does not discharge such burden by merely showing a delivery to the carrier in good condition and a delivery by the carrier in an injured condition. So held in *Grow v. Chicago & A. R. Co.*, 57 Mo. App. 135.

**Kicking Horse—Car Slat Repaired, but Found Broken at End of Trip.**—In *Hayman v. Philadelphia, etc., R. Co.*, 8 N. Y. St. Rep. 86, an action against a common carrier to recover for injuries received by a horse while in transit, it appeared that the car in which plaintiff's horses were shipped was in good condition and suitable for the purpose when the animals were placed in it, and that during the transportation a slat in the car became broken; but there was no evidence to show that such break was occasioned by negligence of the carrier, and it appeared that one of the horses was kicking violently, and that the break was properly repaired. At the end of the trip a slat was again found to be broken and the horse injured. It was held that to sustain the cause of action the burden of proof was upon plaintiff to show facts from which the jury would be justified in finding that there was an omission of duty on the part of the carrier, and that it was not sufficient to show that the horse was injured.

## 12. Burden of Proof Where Shipper Travels in Charge of Shipment.

Ordinarily the burden of proof is on the carrier to account for freight lost during transit, but in case of a special contract under which the shipper accompanies the shipment for the purpose of taking charge of it en route, the burden is upon the shipper of proving that a loss was the result of the carrier's negligence.

**Alabama.**—*Alabama Great Southern R. Co. v. Thomas*, 89 Ala. 294, 7 So. 762; *Central R., etc., Co. v. Smitha*, 85 Ala. 47, 4 So. 708.

**Arkansas.**—*St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134.

**California.**—*Ringgold v. Haven*, 1 Cal. 108.

**Iowa.**—*Winne v. Illinois Cent. R. Co.*, 31 Iowa 583.

**Kentucky.**—*Louisville, etc., R. Co. v. Hedger (Ky.)*, 9 Bush 645.

**Missouri.**—*Clark v. St. Louis, etc., R. Co.*, 64 Mo. 440; *McBeath v. Wabash, etc., R. Co.*, 20 Mo. App. 445.

**Texas.**—*Texas, etc., R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829.

**Wisconsin.**—*Doty v. Strong*, 1 Pin. (Wis.), 313.

Where animals are injured in transit, and there is no evidence to show that they were injured from an inherent want of vitality, or by reason of injuries inflicted on each other, or by unavoidable accident, the carrier has the burden of proving that the injuries were occasioned by some other cause than its own negligence though the shipper accompanies the shipment. So held in *Nelson v. Great Northern Ry. Co. (Mont.)*, 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311, 72 Pac. 642, 28 Mont. 297.

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**13. Actionable Negligence.**

The plaintiff is not ordinarily required to show, in the first instance, that the injury upon which the action is based was due to negligence for which the carrier is responsible. *Doan v. St. Louis, etc., R. Co.*, 38 Mo. App. 408; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339.

**Cause of Loss—Affirmative Proof Not Required of Plaintiff.**—To warrant recovery against a carrier for the negligent loss of freight, plaintiff is not required to show, affirmatively, how the loss occurred, and that its occurrence was through defendant's negligence. So held in *Westcott v. Fargo*, 63 Barb. (N. Y.) 349.

**Suit Based on Alleged Negligence.**—But it has been held that where the suit for loss of or injury to freight is based upon the alleged negligence of the carrier or that of its employees, plaintiff has the burden of proving such allegation. *The New Orleans (C. C.)*, 26 Fed. Rep. 44; *Smith v. American Express Co.*, 108 Mich. 572, 66 S. W. 479; *George v. Chicago, R. I. & P. Ry. Co.*, 57 Mo. App. 358; *Farr v. Adams Express Co.*, 100 Mo. App. 574; *Ficklin v. Wabash R. Co.*, 117 Mo. App. 211, 93 S. E. 841; *Mann v. Birchard*, 40 Vt. 326.

**Violent Storms Encountered—Cargo Damaged by Water—Improper Storage.**—Where a ship during the voyage encountered storms of such violence as to reasonably account for the opening of her deck seams and the consequent damage to her cargo from water, the burden of proof rests upon the cargo owner to establish a claim made by him that improper storage of the cargo caused or contributed to the strain on the vessels deck and the resulting injury thereto. So held in *The Musselecrag (D. C.)*, 125 Fed. Rep. 786.

**Proximate Cause.**—In an action against a railroad for injury to stock in transit, the burden is on plaintiff to establish that the negligence alleged was the proximate cause of the injury. So held in *Peterson v. Chicago, etc., Ry. Co. (S. Dak.)*, 102 N. W. 595, 18 R. R. R. 48, 41 Am. & Eng. R. Cas., N. S., 48.

**14. No Presumption of Negligence from Mere Fact of Loss or Injury.**

But it is generally held that the mere fact that freight is lost or injured while in the carrier's custody does not give rise to a presumption of negligence on its part or that of its employees. *The Queen*, 78 Fed. Rep. 155; *Jones v. Minneapolis, etc., R. Co.*, 91 Minn. 229, 97 N. W. 893; *Anderson v. Atchison, etc., R. Co.*, 93 Mo. App. 677; *Farr v. Adams Express Co.*, 100 Mo. App. 574; *Needy v. Western Maryland R. Co.*, 22 Pa. Supe'r Ct. 494.

**Mere Proof of Wetting of Freight.**—Where a shipper sues a railroad company, as a common carrier, for damage to freight by wetting while in transit, mere proof of the wetting does not establish a conclusive presumption of negligence. So held in *Mears v. New York, etc., R. Co.*, 75 Conn. 171, 52 Atl. 610.

**Cotton Destroyed by Fire on Isolated Landing—Absence of Extinguishing Appliances.**—Where cotton alleged to be in charge of a carrier's agent is destroyed by fire while lying uncovered and unprotected at an isolated country landing, awaiting shipment by a steamboat, and there is no evidence as to how the fire originated, the fact that no appliances for extinguishing fire were at hand, and that no watch was maintained, will not justify the inference of negligence, since, under such circumstances, no danger from fire could reasonably be anticipated. So held in *The Guiding Star (D. C.)*, 53 Fed. Rep. 936.

**15. Negligence May Be Shown Inferentially.**

Where the burden is upon plaintiff to show negligence on part of the carrier, it is not necessary to do this by direct evidence; and evidence from which such negligence may be inferred is sufficient to cast the burden of rebuttal upon the carrier. *Crow v. Chicago & A. R. Co.*,

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57 Mo. App. 135; *Griffin v. Wabash Ry. Co.*, 115 Mo. App. 549, 91 S. W. 1015.

**16. Burden of Proving Defendant a Common Carrier.**

In an action to recover against defendant as a common carrier, plaintiff must prove that such was defendant's status. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.), 16; *The Westminster (C. C. A.)*, 127 Fed. Rep. 680; *South & North Alabama R. Co. v. Wood*, 71 Ala. 215, 46 Am. Rep. 309, 16 Am. & Eng. R. Cas., 267; *Ringgold v. Haven*, 1 Cal. 108; *Missouri Pac. R. Co. v. Douglas*, 2 Tex. App. Civ. Cas. 328.

**Carrier's Liability beyond Its Own Line.**—Where it is sought to extend the liability of a common carrier beyond its own line, the burden is upon the party seeking to establish such liability to show an express contract by which the company becomes liable, as common carrier, beyond its own route; and such contract must be shown by real and satisfactory evidence. So held in *Taylor v. Maine Cent. R. Co. (Me.)*, 2 Am. & Eng. R. Cas., N. S., 614.

**Burden of Showing Loss of Freight between Time of Delivery to Carrier and Time Car Was Left on Side Track.**—In *South & North Alabama R. Co. v. Wood*, 71 Ala. 215, 46 Am. Rep. 309, 16 Am. & Eng. R. Cas. 267, an action against a railroad company, as a common carrier, to recover for its failure to deliver corn received by it for transportation to a designated point on its road, at which there was neither depot or agent, it appeared that the corn was received by the company and transported in good condition to the place of destination, and the car in which it was shipped, was placed on a side-track by the consignee, where it remained for several days, with no one in charge of it or protecting it; and that when the corn was taken from the car, there was a deficiency in quantity. It was held that the burden of proof was on the plaintiff to show that the loss occurred between the time when the corn was received by the company, and the time when the car containing it was left on the side-track, that being, under the facts of this case, a delivery, and not on the defendant to show that the loss occurred after the car was placed on the side track.

**Cars Burned on Consignee's Side Track—Failure to Show Whether Unloaded before Arrival at Destination.**—Where railroad cars loaded with goods are carried to the place of destination of the goods, and are there, by the direction of the shipper, placed upon the sidetrack of the consignee for the purpose of being unloaded, and the cars, after being unloaded, are to be taken by the carrier to the storage-yard, and they are burned on such side-track before they are removed, and it is not shown whether they were unloaded before arrival at their destination or that the carrier had again taken them in charge for removal and storage, the carrier will not be liable, as such, for their loss. So held in *Peoria, etc., Ry. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. 59.

**Payment of Freight.**—Where goods are delivered to a common carrier for transportation, a promise to pay freight charges will be implied, and it is not necessary to prove payment or tender of the charges in order to hold it liable in its capacity of common carrier. So held in *Winne v. Illinois Cent. R. Co.*, 31 Iowa 583.

**17. Occurrence of Loss During Continuance of Common-Carrier Possession.**

Some of the cases seem to hold that the burden is upon plaintiff to show that the loss of or injury to freight complained of occurred while the carrier was responsible for the property as a common carrier. *South, etc., R. Co. v. Wood*, 71 Ala. 215, 46 Am. Rep. 309, 16 Am. & Eng. R. Cas. 267; *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 269; *Peoria, etc., R. Co. v. United States Rolling Stock*

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Co., 136 Ill. 643, 27 N. E. 59; Atchison, etc., R. Co. *v.* Richardson, 53 Kan. 157, 35 Pac. 1114; Nave *v.* Pacific Express Co., 19 Mo. App. 563; Missouri Pac. R. Co. *v.* Heath (Tex.), 18 S. W. 477; Texas, etc., R. Co. *v.* Llano Live Stock Co. (Tex. Civ. App.), 33 S. W. 748; Curtis *v.* Chicago, etc., R. Co., 18 Wis. 312.

**18. Value of Lost Freight—Burden on Plaintiff.**

Of course, plaintiff, in an action to recover the value of freight lost while in the defendant carrier's custody, must prove its value.

**United States.**—The E. M. Norton (C. C.); 15 Fed. Rep. 686.

**Georgia.**—Purcell *v.* Southern Express Co., 34 Ga. 314; Richmond & D. R. Co. *v.* White & Co., 88 Ga. 805, 15 S. E. 802.

**Illinois.**—Adams Express Co. *v.* Stettaners, 61 Ill. 184.

**Iowa.**—Cownie Glove Co. *v.* Merchants' Dispatch Transp. Co. (Iowa), 106 N. W. 749.

**Louisiana.**—Chapman *v.* New Orleans, etc., R. Co., 21 La. Ann. 224; Kirk *v.* Folsom, 23 La. Ann. 584.

**Maine.**—Little *v.* Boston & Maine R. R., 66 Me. 239.

**Missouri.**—Grier *v.* St. Louis, etc., Ry. Co., 108 Mo. App. 565, 84 S. W. 158; Kirby *v.* Adams Express Co., 2 Mo. App. 369; Lupe *v.* Atlantic & Pac. R. Co., 3 Mo. App. 77; McFall *v.* Wabash Ry. Co., 117 Mo. App. 477.

**Failure to Take Bill of Lading—Amount of Grain.**—A shipper of a cargo of grain, who takes no bill of lading from the carrier, is bound, in an action brought for short delivery, to prove the amount delivered by him to the carrier to be transported. Manning *v.* Hoover (D. C.), Fed. Cas. No. 9,044.

**Money in Sealed Package—"Said to Contain"—Effect of Recital.**—Where a package of money, in a sealed envelope, is delivered to a common carrier for carriage, and a receipt is given reciting that the package is "said to contain" a given amount, such recital is not prima facie proof that the package did contain such amount. So held in Fitzgerald *v.* Adams Express Co., 24 Ind. 447.

**Money in Sealed Package—Failure of Carrier to Count.**—A common carrier's refusal to count money delivered to it in a sealed package for carriage, at the request of the consignee, will not create any presumption against it as to the amount contained in the package. So held in Fitzgerald *v.* Adams Express Co., 24 Ind. 447.

**Nominal Value of Bank Notes.**—In the absence of all evidence to the contrary, the law will presume that bank notes delivered to a common carrier for transportation are worth their nominal value. So held in Harris *v.* Moody, 17 N. Y. Sup'r Ct. Rep. 210.

**19. Loss of Portion of Freight—Burden of Proving Its Class.**

Where a shipment was composed of several classes of goods, and a portion of it was lost, there is no legal presumption as to whether such portion belonged to the least or most valuable class, or to any particular class. Lake Shore Nitro-Glycerine Co. *v.* Illinois Cent. R. Co., 75 Ill. 394.

**Loss of Part of Shipment of Carboys—Whether Nitric or Sulphuric Acid.**—In Lake Shore N. G. Co. *v.* Illinois Cent. R. Co., 75 Ill. 394, a suit against the railroad company, as a common carrier, to recover for the loss of the greater part of a shipment of carboys, part containing nitric acid and the others containing sulphuric acid, the former being of much the greater value, the proof was unsatisfactory, as to the proportion of each, but there was proof tending to show that the car contained the acids in the usual proportions to be mixed in the manufacture of nitro-glycerine. The court instructed the jury that "the legal presumption is that, the burden of proof being on the plaintiff, all the acids so lost, and not proven to have been nitric, and most valuable, must have been sulphuric, and of the

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least value." It was held that there was no legal presumption in such a case, but it was a question of fact from the evidence, whether the carboys, or most of those destroyed, contained nitric or sulphuric acid.

**Portion of Shipment of Sugar Lost—Average Weight of Bags.**—In the *American Sugar-Refining Co. v. The Eurepides* (D. C.), 63 Fed. Rep. 140, it is held that where the bill of lading recites the shipment, in good order and condition, of a certain number of bags of sugar, weight unknown, and on arrival of the ship certain of the bags are empty, it will be presumed that they were full when delivered to the carrier, and that their average weight was that of the lightest bags in the cargo, from which there is no evidence to show that they differed, making allowance for the increased weight of such bags from absorption of water.

**Loss of Bank Notes—Contribution—Nominal Value.**—In *Harris v. Moody*, 30 N. Y. 266, it is held that bank notes carried as freight for an express company are liable to contribute to a general average loss, and that, *prima facie*, they contribute according to their nominal value.

## II. DEFENDANT'S BURDEN OF PROOF.

### 1. Burden on Carrier to Prove Itself Not Responsible for Cause of Injury.

After it has been shown that the freight was delivered to the carrier in good condition, the burden rests upon the carrier to prove that the loss or injury upon which the action is based resulted from some cause for which it is not responsible.

**United States.**—*Argo Steamship Co. v. Seago* (C. C. A.), 101 Fed. Rep. 999; *Ceballos v. The Warren Adams* (C. C. A.), 74 Fed. Rep. 413; *Choate v. Croninshield* (C. C.), Fed. Cas. No. 2, 691; *Cumming v. The Barracouta* (C. C.), 40 Fed. Rep. 498; *Hudson River Lighterage Co. v. Wheeler Condenser, etc., Co.*, 93 Fed. Rep. 374; *The Jefferson* (C. C.), 31 Fed. Rep. 489; *Kerr v. The Norman* (D. C.), Fed. Cas. No. 7,732; *The Martha* (D. C.), Fed. Cas. No. 9,145; *The Queen* (D. C.), 78 Fed. Rep. 155; *The Samuel E. Spring*, 29 Fed. Rep. 397; *The Staincliffe* (C. C.), 15 Fed. Rep. 350; *Turner v. The Black Warrior* (C. C.), Fed. Cas. No. 14,253; *United States v. Pacific Express Co.* (D. C.), 15 Fed. Rep. 867; *The Westminster* (C. C. A.), 127 Fed. Rep. 680; *The Wildcroft*, 126 Fed. Rep. 229; *The Williams Taber* (U. S.), 2 Ben. 329; *The Joneses* (D. C.), Fed. Cas. No. 18,220; *Western Mfg. Co. v. The Guilding Star* (C. C.), 37 Fed. Rep. 641.

**Alabama.**—*Alabama Great Southern R. Co. v. Little*, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; *Louisville, etc., R. Co. v. Cowherd*, 120 Ala. 51; 23 So. 793; *Monton v. Louisville & N. R. Co.* (Ala.), 20 Am. & Eng. R. Cas., N. S., 673, 29 So. 602, 128 Ala. 537; *Richmond & D. R. Co. v. Trousdale*, 99 Ala. 389, 13 So. 23; *Nashville, etc., R. Co. v. Parker*, 123 Ala. 683; *South & North Ala. R. Co. v. Wilson*, 78 Ala. 587, 27 Am. & Eng. R. Cas. 41; *South, etc., Alabama R. Co. v. Wood*, 66 Ala. 167.

**Arkansas.**—*St. Louis S. W. R. Co. v. Birdwell*, 72 Ark. 502; 82 S. W. 835; *St. Louis, etc., R. Co. v. Coolidge* (Ark.), 83 S. W. 333.

**California.**—*Agnew v. Steamer Contra Costa*, 27 Cal. 426; *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 269; *Wilson v. California Cent. R. Co.*, 94 Cal. 166; 29 Pac. 861.

**Connecticut.**—*Boies v. Hartford, etc., R. Co.*, 37 Conn. 272; *Mears v. New York, etc., R. Co.*, 75 Conn. 171, 52 Atl. 610.

**Florida.**—*Savannah, etc., Ry. Co. v. Harris*, 26 Fla. 148; 7 So. 544, 42 Am. & Eng. R. Cas. 457.

**Georgia.**—*Charlotte, C. & A. R. Co. v. Wooten*, 87 Ga. 203; 13 S. E. 509; *Central R. Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838; *Cohen v. Southern Express Co.* 53 Ga. 128; *Columbus & Western Ry. Co. v.*



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Kennedy, 78 Ga. 646, 3 S. E. 267; *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 18 Am. & Eng. R. Cas., N. S., 412; *Georgia, etc., R. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287; *Purcell v. Southern Express Co.*, 34 Ga. 314; *Richmond, etc., R. Co. v. White*, 88 Ga. 805, 15 S. E. 802; *Van Winkle v. South Carolina R. Co.*, 38 Ga. 32.

**Illinois.**—*Adams Express Co. v. Stettanus*, 61 Ill. 184; *Baltimore & Ohio S. W. R. Co. v. Fox*, 113 Ill. App. 180; *Burke v. United States Express Co.*, 87 Ill. App. 505; *Chesapeake & Ohio R. Co. v. Radbourne*, 52 Ill. App. 203.

**Indiana.**—*Pennsylvania Co. v. Liveright*, 14 Ind. App. 518; *Pittsburg, etc., Ry. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. 853; *Toledo, St. Louis, etc., R. Co. v. Tapp*, 6 Ind. App. 304; 33 N. E. 462.

**Iowa.**—*Angle v. Mississippi & M. R. Co.*, 18 Iowa, 555; *Cownie Glove Co. v. Merchants' Dispatch Transp. Co. (Iowa.)*, 106 N. W. 749; *Grieve v. Illinois Cent. R. Co.*, 104 Iowa, 659; 74 N. W. 192; *McCoy v. Koekuk, etc., R. Co.*, 44 Iowa, 424; *Mitchell v. United States Express Co.*, 46 Iowa, 214; *St. Clair v. Chicago B. & Q. Ry. Co.*, 80 Iowa, 304; 45 N. W. 570; *Tiller & Smith v. Chicago, etc., Ry. Co. (Iowa)*, 24 R. R. R. 581, 47 Am. & Eng. R. Cas., N. S., 581, 112 N. W. 631; *Winne v. Illinois Cent. R. Co.*, 31 Iowa, 583.

**Kentucky.**—*Adams Express Co. v. Walker (Ky.)*, 83 S. W. 106; *Ohio, etc., R. Co. v. Tabor*, 98 Ky. 503; 32 S. W. 168, 36 S. W. 18.

**Louisiana.**—*Chapman v. New Orleans, etc., R. Co.*, 21 La. Ann. 224; *Grieff v. Switzer*, 11 La. Ann. 324; *Lehmann, Stern & Co. v. Morgan's, etc., Co. (La.)*, 38 So. 873, 18 R. R. R. 559, 41 Am. & Eng. R. Cas., N. S., 559; *Price, Frost & Co. v. Ship Uriel*, 10 La. Ann. 413; *Roberts v. Riley*, 15 La. Ann. 103; *Silverman v. St. Louis, etc., R. Co.*, 51 La. Ann. 1785; 26 So. 447; *Tardos v. Toulon*, 14 La. Ann. 429.

**Maine.**—*Bennett v. American Express Co.*, 83 Me. 236, 22 Atl. 159, 49 Am. & Eng. R. Cas. 56; *Dow v. Portland Steam Packet Co.*, 84 Me. 490, 24 Atl. 945; *Little v. Boston & Maine R. Co.*, 66 Me. 239; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339.

**Massachusetts.**—*Alden v. Pearson (Mass.)*, 3 Gray, 342; *Cass v. Boston, etc., R. Co.*, 14 Allen (Mass.), 448; *Lewis v. Smith*, 107 Mass. 334.

**Michigan.**—*Wallace v. Lake Store, etc., Ry. Co. (Mich.)*, 95 N. W. 750.

**Minnesota.**—*Born v. Chicago, M. & St. Paul Ry. Co.*, 44 Minn. 191, 46 N. W. 333; *Hinton v. Eastern Ry. Co.*, 72 Minn. 339, 75 N. W. 373; *Hull v. Chicago, etc., Ry. Co.*, 41 Minn. 510; 43 N. W., 391; *Lindsley v. Chicago, M. & St. Paul Ry. Co.*, 36 Minn. 559, 33 N. W. 7; *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506; *Powers Mercantile Co. v. Wells-Fargo & Co. (Minn.)*, 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504, 100 N. W. 736.

**Mississippi.**—*Burnham v. Alabama & Vicksburg R. Co.*, 81 Miss. 46; *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017; 21 Am. & Eng. R. Cas. 105; *Gardner v. New Orleans, etc., R. Co.*, 78 Miss. 640; *Southern Express Co. v. Seide*, 67 Miss. 609, 7 So. 547.

**Missouri.**—*Anderson v. Atchison, F. & S. F. Ry. Co. (Mo. App.)*, 3 R. R. R. 42, 26 Am. & Eng. R. Cas., N. S., 42; *Buddy v. Wabash, etc., R. Co.*, 20 Mo. App. 206; *Davis v. Wabash, etc., Ry. Co.*, 1 Mo. App. 340; *George v. Chicago, etc., R. Co.*, 57 Mo. App. 358; *Green v. Indianapolis, etc., R. Co.*, 56 Mo. 556; *Grier v. St. Louis, etc., Ry. Co.*, 108 Mo. App. 565, 84 S. W. 158; *Flynn v. St. Louis & S. F. Ry. Co.*, 43 Mo. App. 424; *Heck v. Missouri Pac. Ry. Co.*, 51 Mo. App. 532; *Hill v. Sturgeon*, 28 Mo. 323; *Ketchum v. American Merchants' Union Express Co.*, 52 Mo. 390; *Kirby v. Adams Express Co.*, 2 Mo. App. 369; *McFall v. Wabash Ry. Co.*, 117 Mo. App. 477; *Nave v. Pacific Express Co.*, 19 Mo. App. 563; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Rice v. Indianapolis & St. L. R. Co.*, 3 Mo. App. 27; *Wolf v. American Express Co.*, 43 Mo. 421.

**New Hampshire.**—*Hall v. Cheney*, 36 N. H. 26; *Sheldon v. Robinson*, 7 N. H. 157.



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**New Jersey.**—Hunt *v.* Morris, 12 N. J. L. 175.

**New York.**—Blum *v.* Monahan (N. Y.), 36 Misc. Rep. 179; Bowden *v.* Fargo, 2 N. Y. Misc. Rep. 551; Brooks *v.* Dinsmore, 3 N. Y. St. Rep. 587; Campe *v.* Weir, 28 N. Y. Misc. Rep. 243, 15 N. Y. Supp. 1082; Canfield *v.* Baltimore, etc., R. Co., 93 N. Y. 532, 16 Am. & Eng. R. Cas. 152, 45 Am. Rep. 268; Colt *v.* M'Mechen, 6 Johns (N. Y.), 160; Fairfax *v.* New York, etc., R. Co., 67 N. Y. 11; Heyl *v.* Inman Steamship Co., 14 Hun. (N. Y.), 564; Hoffberg *v.* Bunford (N. J. Sup. Ct.), 88 N. Y. Supp. 940; Hutkoff *v.* Pennsylvania R. Co., 29 N. Y. Misc. Rep. 770, 61 N. Y. Supp. 254; Merritt *v.* Earle, 31 Barb. (N. Y.), 38; Moore *v.* Evans, 14 Barb. (N. Y.), 11; Morris *v.* Wier, 20 N. Y. Misc. Rep. 586; Park *v.* Preston, 108 N. Y. 434; 15 N. E. 705; Schmidt *v.* Blood, 9 Wend. (N. Y.), 268; Sejalon *v.* Woolverton, 31 N. Y. Misc. Rep. 752, 66 N. Y. Supp. 48; Steers *v.* Liverpool, etc., Steamship Co., 57 N. Y. 6; Strong *v.* Long Island R. Co., 91 N. Y. App. Div. 442; Trimble *v.* New York, etc., R. Co., 39 N. Y. App. Div. 403.

**North Carolina.**—Everett *v.* Norfolk & S. R. Co. (N. Car.), 50 S. E. 557, 18 R. R. R. 551, 41 Am. & Eng. R. Cas., N. S., 551; Hinkle, Craig & Co. *v.* Southern Ry. Co., 126 N. Car. 932, 36 S. E. 675; Mitchell *v.* Carolina Cent. R. Co., 124 N. Car. 236, 32 S. E. 671; Parker *v.* Atlantic Coast Line R. Co., 133 N. Car. 335.

**Pennsylvania.**—Adams Express Co. *v.* Holmes (Pa.), 9 Atl. 166; American Express Co. *v.* Sans, 55 Pa. St. 140; Buck *v.* Pennsylvania R. Co., 150 Pa. St. 170, 24 Atl. 678; Bell *v.* Reed (Pa.), 4 Bin. 127; Clark *v.* Spence, 10 Watts (Pa.), 335; Davenport *v.* Penn. R. Co., 10 Pa. Supe'r Ct. 47; Empire Trasp. Co. *v.* Wamsutta Oil Refining, etc., Co., 63 Pa. St. 14; Grogan *v.* Adams Express Co., 114 Pa. St. 523, 7 Atl. 134; Hays *v.* Kennedy, 3 Grant (Pa.), 351; Menner *v.* Delaware & H. Canal Co., 7 Pa. Sup'r Ct. 135; New York Cent., etc., R. Co. *v.* Eby (Pa.), 12 Atl. 482; Pennsylvania R. Co. *v.* Miller, 87 Pa. St. 395; Pennsylvania R. Co. *v.* Raiordon, 119 Pa. St. 577, 13 Atl. 324; Phoenix Pot Works *v.* Pittsburgh, etc., R. Co. (Pa.), 20 Atl. 1058; Trace *v.* Pennsylvania Railroad, 26 Pa. Sup'r Ct. Rep. 466; United Fruit Co. *v.* Bisese, 25 Pa. Sup'r Ct. 170.

**South Carolina.**—Ewart *v.* Street (S. Car.), 2 Bailey, 421; Johnstone *v.* Richmond, etc., R. Co., 39 S. Car. 55, 17 S. E. 512; McCall *v.* Brock (S. Car.), 5 Strobb. 119; Smyrl *v.* Niolon (S. Car.), 5 Bailey, 421; Wallingford *v.* Columbia, etc., R. Co., 26 S. Car. 258, 2 S. E. 19; Wardlow *v.* South Carolina R. Co., 11 Rich. L. (S. Car.), 337.

**Tennessee.**—Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306; 17 S. W. 89; Louisville & N. R. Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. 311; Merchants' Dispatch Transp. Co. *v.* Block, 86 Tenn. 392; 6 S. W. 881; Nashville, etc., Ry. *v.* Stone & Haslett (Tenn.), 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88, 79 S. W. 1031; Pennsylvania R. Co. *v.* Naive (Tenn.), 12 R. R. R. 126, 35 Am. & Eng. R. Cas., N. S., 126, 79 S. W. 124; Turney *v.* Wilson, 7 Yerg (Tenn.), 340.

**Texas.**—Atchison, etc., R. Co. *v.* Bryan (Tex. Civ. App.), 37 S. W. 234; Bibb *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 84 S. W. 663; Fire Ass'n *v.* Loeb (Tex. Civ. App.), 59 S. W. 617; Fort Worth, etc., R. Co. *v.* Shanby (Tex. Civ. App.), 81 S. W. 1014; Gulf, etc., R. Co. *v.* Browne, 27 Tex. Civ. App. 437; Missouri Pac. R. Co. *v.* Scott (Tex. Civ. App.), 26 S. W. 239; Ryan *v.* Missouri, etc., R. Co., 65 Tex. 13; 23 Am. & Eng. R. Cas. 703; San Antonio, etc., R. Co. *v.* Josey (Tex. Civ. App.), 71 S. W. 606; St. Louis, etc., R. Co. *v.* Martin (Tex. Civ. App.), 35 S. W. 28; St. Louis, etc., R. Co. *v.* Parmer (Tex. Civ. App.), 30 S. W. 1109; St. Louis S. W. Ry. Co. *v.* McIntyre (Tex. Civ. App.), 82 S. W. 346; Southern Pac. R. Co. *v.* D'Arcai, 27 Tex. Civ. App. 57; Texas, etc., R. Co. *v.* Morse, 1 Tex. Civ. App. Cas. § 411.

**Vermont.**—Day *v.* Ridley, 16 Vt. 48; Mann *v.* Birchard, 40 Vt. 326.

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**Virginia.**—Murphy, Brown & Co. *v.* Staton, 3 Munf. (Va.), 239; Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284; 33 S. E. 606.

**West Virginia.**—Baltimore & Ohio R. Co. *v.* Morehead, 5 W. Va. 293; Bosley *v.* Baltimore & O. R. Co. (W. Va.), 10 R. R. R. 458, 33 Am. & Eng. R. Cas., N. S., 458, 46 S. E. 613.

**Wisconsin.**—Black *v.* Goodrich Transp. Co. (Wis.), 55 Wis. 319, 13 N. W. 244; Browning *v.* Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428; Lamb. *v.* Chicago, etc., R. Co., 101 Wis. 138, 76 N. W. 1123; Kirst *v.* Milwaukee, etc., Ry. Co., 46 Wis. 489, 1 N. W. 891.

Where no explanation is given as to how injury to freight occurred, a presumption of negligence arises, sufficient to warrant a recovery in cases where there is no other proof than of the delivery of the goods to the carrier in good condition and their arrival at destination in a damaged condition. So held in *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, 24 Atl. 678.

In order to recover for loss or injury to freight, after proving a contract for the carriage of the goods and the delivery of them to the carrier, the shipper need only to show that the goods have not arrived or have received injury, unless the carrier proves the performance of his contract. So held in *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339.

Where property has been delivered in good condition to a carrier, and it has been damaged while in its possession, nothing else appearing, the presumption is that there has been negligence on the part of the carrier, and the burden is on it to remove such presumption. So held in *Pennsylvania R. Co. v. Naive* (Tenn.), 12 R. R. R. 126, 35 Am. & Eng. R. Cas., N. S., 126, 79 S. W. 124.

**Failure to Deliver Goods Safely—Prima Facie Case.**—In an action against a railroad as a carrier of freight for loss of goods, a prima facie case is established by proof that the carrier received the goods for transportation and failed to deliver them safely. So held in *Southern Ry. v. Levy* (Ala.), 39 So. 95, 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50.

**Impossibility of Injury from Intervention of Human Means.**—The presumption of the law is against a common carrier, except it be made to appear that the injury complained of could not have happened by the intervention of human means. So held in *Agnew v. Steamer Contra Costa*, 27 Cal. 426.

**Excusing Circumstances.**—The burden of proof is upon a common carrier who has received property for transportation to show the circumstances which will excuse it or relieve it from liability. So held in *Angle v. Mississippi & M. R. Co.*, 18 Iowa, 555.

**Facts Exempting from Liability.**—Proof of ownership of property by the plaintiff, its delivery to and acceptance by a common carrier for transportation, and its non-delivery to the consignee, are prima facie evidence of negligence, and throws the burden upon the carrier to show facts exempting it from liability. So held in *Bennett v. American Express Co.*, 83 Me. 236, 22 Atl. 159, 49 Am. & Eng. R. Cas. 56.

**Valid Excuse.**—If a carrier fails to carry safely, the burden is upon it to prove a valid excuse. So held in *Hays v. Kennedy*, 3 Grant (Pa.), 351.

**Impossibility of Preventing by Skill and Foresight.**—A common carrier has the burden of proving that the loss of or damage to freight, for which it is sued, was such as could not be prevented by skill and foresight. So held in *Baltimore & Ohio R. Co. v. Morehead*, 5 W. Va. 293.

**Rationale of Rule.**—Where goods are delivered into the possession of a common carrier, it is for him to show that he used due care for their preservation, for the shipper is not supposed to be present during the transportation, and the goods are in the custody of the owners

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of the vessel and their agents. So held in *Tardos v. Ship Toulon*, 14 La. Ann. 429.

**Injury Occasioned by Uncontrollable Events.**—While common carriers are not considered, under the provisions of the Civil Code of Louisiana, as insurers against loss or damage by fire, they are liable, "unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events." So held in *Lehmann, Stern & Co. v. Morgan's, etc., Co. (La.)*, 38 So. 873, 18 R. R. R. 559, 41 Am. & Eng. R. Cas., N. S., 559.

**Goods Forwarded Through Express Company Destroyed En Route.**—By the law of Illinois as construed in the courts of that state, when property was forwarded to the owner through an express company, and was destroyed en route, the finding of the trial court is sustained that the accident was through the actionable negligence of the express company. So held in *Powers Mercantile Co. v. Wells-Fargo & Co. (Minn.)*, 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504, 100 N. W. 736.

**Perishable Freight.**—When goods, though perishable or liable to rapidly deteriorate from internal causes, are damaged while in the custody of the carrier, the burden of proof is upon it to show either that it was free from negligence, or that notwithstanding its negligence, the damage occurred without its fault. So held in *Central R., etc., Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838.

**Injury by Reason of What Carrier Provided for Transportation.**—If freight be lost or injured in an accident happening to or by reason of that which a common carrier has provided for the transportation, the law presumes the accident to be due to the want of proper care and puts upon the carrier the burden of relieving itself from that presumption. So held in *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577, 13 Atl. 324; *Trace v. Penn. Railroad*, 26 Pa. Sup'r Ct. Rep. 466.

**Carrier Using Means of Carriage of Others.**—In *Chesapeake & Ohio Ry. Co. v. Radbourne*, 52 Ill. App. 203, it is held that a common carrier, in accepting and using the means of carriage, by whomsoever selected and tendered, without fraud, assumes all the risks of their defects, and in the absence of a special contract exempting it from liability, except for a failure to exercise ordinary care, proof of actual loss or damage of the freight in transit, is prima facie evidence of such failure, and casts the burden of proof upon the carrier.

**Presumption of Negligence.**—The presumption, in case of loss of goods received by a carrier for transportation, is that it was lost through its negligence. So held in *Everett v. Norfolk & S. R. Co. (N. Car.)*, 50 S. E. 557, 18 R. R. R. 551, 41 Am. & Eng. R. Cas., N. S., 551.

**Act of God or Public Enemy.**—Where there has been a loss of freight in transit, in the absence of a contract limiting the carrier's liability, it must show affirmatively that the loss resulted from a cause for which it was not responsible, such as the act of God or the public enemy. So held in *Nashville, etc., Ry. v. Stone & Haslett (Tenn.)*, 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88, 79 S. W. 1031.

**Baggage Lost.**—Where a person has a proper ticket for his transportation as a passenger, and had his baggage checked, and it is lost, the burden is upon the carrier to prove that the loss occurred from a cause for which it is not responsible. So held in *Toledo, St. Louis, etc., R. Co. v. Topp*, 6 Ind. App. 304.

**Loss without Carrier's Fault.**—In an action against a railroad company for failure to deliver freight, where the delivery of it to the carrier, and the failure of the carrier to deliver it at its destination, is proved, the burden of proof is on the company to show that the loss occurred without its fault. So held in *Mouton v. Louisville & N. R. Co.*, 128 Ala. 537, 20 Am. & Eng. R. Cas., N. S., 673, 29 So. 602.

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**Failure of Express Company to Deliver.**—Where goods are sent by an express company and they fail to arrive at their destination, a presumption of want of ordinary care is raised against the company. So held in *Adams Express Co. v. Stettaners*, 61 Ill. 184.

**Goods Lost while in Express Company's Custody.**—A presumption of negligence on the part of an express company arises where goods shipped by it are lost in its custody while in course of transportation. So held in *Grogan v. Adams Express Co.*, 114 Pa. St. 523, 7 Atl. 134.

**Loss of Money Delivered to Express Company.**—In an action against an express company for the loss of money delivered to it for transportation, it is only necessary for plaintiff to prove the delivery of the money to defendant and its failure to deliver it to the consignee. *United States v. Pacific Express Co. (D. C.)*, 15 Fed. Rep. 867.

**Power of Express Company to Trace Freight—Liability Limited to Gross Negligence.**—An express company has it within its power to trace goods and discover where they were lost, while it is not so with the shipper, and, therefore, the burden is upon the company to show that it has used reasonable care, even where it has stipulated that it was only to be held liable for gross negligence. So held in *Adams Express Co. v. Stettanus*, 61 Ill. 184.

**Deviation—Loss of Cargo.**—In *Le Sage v. Great Western Ry. Co.*, 1 Daly (N. Y. Com. Pl.), 306, it appeared that defendants, common carriers running connecting lines of railroad from Buffalo to Milwaukee, through their mutual agent in the city of New York, took from plaintiffs the receipt of the Hudson River Railway Company, for certain goods marked, "Janesville, Wis., via M. D. R. R.," and gave therefore a bill of lading, whereby it was agreed that defendants would transport said goods over their lines to Milwaukee. At Buffalo, the goods, instead of being delivered to or received by defendants, were delivered on board a propeller, to be carried thence by lake to Milwaukee, and the propeller and her cargo were lost on such passage. It was held that the burden was on defendants to explain how it was that the goods were forwarded from Buffalo by a different route than theirs, and that their loss occurred under circumstances exonerating them from responsibility.

**Only Portion of Freight Delivered.**—Where goods are delivered securely boxed to a common carrier for carriage, and a part only are delivered by it to the consignee, the presumption is that the loss occurred while the goods were in the carrier's possession. So held in *Rice v. Indianapolis & St. L. R. Co.*, 3 Mo. App. 27.

**Breakage.**—Proof of breakage of goods in the hands of the common carrier makes a prima facie case of negligence against the carrier, and the burden of proof is thrown on it to show due care and diligence. So held in *Ketchum v. American Merchants' Union Express Co.*, 52 Mo. 390.

**Case of Plate Glass Shattered—Other Cases Delivered in Good Condition.**—In *Hutkoff v. Pennsylvania R. Co.*, 29 N. Y. Misc. Rep. 770, 61 N. Y. Supp. 254, it appeared that plate glass contained in a case was found to be shattered upon its delivery to the consignee by defendant carrier; that it was in good condition when delivered to defendant for transportation; and that fifteen other cases of plate glass, which formed part of the same shipment, was delivered by the carrier in good condition. It was held that the presumption was that the case of glass in suit would also have arrived in good condition unless negligently handled or controlled by defendant.

**Piano Broken—Failure of Express Company to Explain.**—In *Bowden v. Fargo*, 2 N. Y. Misc. Rep. 551, an action against an express company to recover damages for an injury to a piano shipped by plaintiff, it appeared that the piano was boxed in a secure and proper manner and at the time of its delivery to the carrier it was in first class order; that from the time of its delivery to the truckman in the

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city of its destination until it was delivered at plaintiff's house, it was carefully handled; and that when opened it was found in a broken and damaged condition. No explanation as to how the injury happened was given by defendant. It was held that proof of the injury, as established by plaintiff, was at least *prima facie* evidence of negligence on the part of defendant, and its failure to explain it was sufficient to render it liable.

**Both Violin and Its Crate Broken—Presumption of Gross Negligence.**—Where a common carrier, after it had safely transported a certain violin when inclosed only in its case, requested its consignor to inclose it also in a crate before a further shipment, and both the crate and the violin arrived at their destination damaged and broken, there was a presumption of gross negligence in handling them, which, when not rebutted, entitled the consignor to recover the value of the violin from the carrier. So held in *Campe v. Weir*, 28 N. Y. Misc. Rep. 243, 15 N. Y. Supp. 1082.

**Machine Delivered with Legs Broken.**—In *Heck v. Missouri Pac. Ry. Co.*, 51 Mo. App. 532, it is held that where a machine was delivered to a common carrier in good condition, well and securely packed, and was delivered by the carrier at its destination with legs broken, a reasonable inference of negligence on the part of the carrier is warranted, which should go to the jury for consideration with the carrier's testimony as to the care taken; and this is so though the burden is on the shipper throughout the trial to prove negligence on the part of the carrier.

**Casting Found Cracked.**—The fact that a casting was delivered to the carrier in good order and was found cracked when delivered to the consignee creates a presumption of negligence on the part of the carrier which casts upon it the burden of proving the cause of the breakage. *Hudson River Lighterage Co. v. Wheeler Condenser & E. Co.* (D. C.), 175, 93 Fed. Rep. 374.

**Unusual Breakage Shown.**—There is sufficient evidence of negligence on the part of the carrier when it appears that the goods were delivered to the carrier in good condition, and that, when delivered to the consignee, the breakage of them was such as does not ordinarily occur when they are transported with due care. So held in *Flynn v. St. Louis & S. F. Ry. Co.*, 43 Mo. App. 424.

**Damaged by Wet.**—A common carrier has the burden of proving that damage to goods in its custody by wet was not due to its negligence. So held in *Mears v. New York, etc., R. Co.*, 75 Conn. 171, 52 Atl. 610.

**Mere Fact That Freight Is Wet.**—But a jury need not infer negligence on the part of a common carrier from the mere fact that goods are wet while in its possession, but such fact may be considered in connection with the other evidence in the case. So held in *Mears v. New York, etc., R. Co.*, 75 Conn. 171, 52 Atl. 610.

**Greatly Damaged by Sea Water.**—Where goods are returned to the port of shipment greatly damaged by sea water, a presumption arises of negligence on the part of the carrier. So held in *The Queen* (D. C.), 78 Fed. Rep. 155.

**Damage to Cargo.**—On trial of a libel against a ship, to recover for damage to cargo proved to have been shipped in good condition, the burden of accounting for such damage is on the ship. So held in *The Zone* (D. C.), Fed. Cas. No. 18,220.

**Steamboat Run into River Bank.**—In an action against a common carrier to recover for the loss of freight in transit, negligence must be presumed where it is shown that the steamboat carrying the freight, when proceeding quietly up the Ohio river, was run into the bank by the pilot so hard as to knock a hole into the bottom of the boat big enough to sink it, and no reason was shown for the accident. So held in *Louisville & C. Packet Co. v. Smith* (Ky.), 60 S. W. 524.

**Occurrence of Accident During Performance of Act Not Ordinarily Cause of Injury.**—Where plaintiff showed that his goods were injured



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while in the possession of defendant railroad company as bailee for hire, and that defendant, when applied to by him, gave no account of the injury except merely that it occurred while defendant's agents were performing an act which, when performed with due care, does not ordinarily cause such an injury, the jury were warranted in inferring negligence for which defendant was responsible. So held in *Kirst v. Milwaukee, Lake Shore & W. Ry. Co.*, 46 Wis. 489, 1 N. W. 89.

**Accidents Which Usually Result from Negligence.**—When a thing is shown to have been under the management of the defendant common carrier or its servant, and the accident in which the loss or injury to freight occurred is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that such accident was due to negligence for which the carrier is responsible. So held in *Rintoul v. New York Cent., etc., R. Co. (C. C.)*, 17 Fed. Rep. 905.

**Excuse for Failure to Furnish Car.**—In an action against a railroad for violation of duty as a common carrier of live stock in failing to furnish cars for the transportation of plaintiff's stock on a certain day, the burden of proof is upon defendant to show that it had a reasonable excuse for such failure. So held in *Pittsburgh, Cincinnati, etc., Ry. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. 853.

**Possibility of Loss Notwithstanding Utmost Endeavors of Crew and Absence of Negligence.**—In the case of loss of freight in transit, the onus probandi lies on the carrier, to exempt him also from the liability, and it is not enough for him to prove, where the goods are carried by water, that the navigation is attended with so much danger that a loss may happen notwithstanding the utmost endeavors of the waterman and crew to prevent it and that the person conducting the boat possesses competent skill, has used due diligence, and provided hands of sufficient strength and experience to assist him. So held in *Murphy, Brown & Co. v. Staton*, 3 Munf. (Va.), 239.

**Delay—Burden of Showing That Portion of Freight Did Not Arrive before Flood.**—After it is shown by dates of shipment that the goods had time to arrive and be delivered to the consignee before the flood by which they were damaged occurred, the burden of showing what part of the goods if any, did not arrive within that time is upon the carrier; and the burden is on the consignee to show the damage done to those which did arrive and the amount thereof, in order to recover on the ground of negligence in not giving notice of arrival, or in not delivering on application. So held in *Richmond & D. R. Co. v. White*, 88 Ga. 805, 15 S. E. 802, 809.

**Statutory Presumption—Insufficient Attempt to Account for Injury—Failure to Introduce Trainmen as Witnesses.**—In *Columbus & Western Ry. Co. v. Kennedy*, 78 Ga. 646, 3 S. E. 267, it is held that, by § 3033 of the Code of Georgia, in cases of injury to persons or property, the presumption in all cases is against the railroad company that the injury was the result of its negligence, and, to relieve itself of this presumption, it is incumbent upon it to show that it was in the exercise of all ordinary and reasonable care and diligence; and this presumption is applicable as well to an action founded upon its general liability as to one founded on a shipping contract releasing the carrier from any claim for damages except such as might arise from gross and wanton negligence; and where the carrier showed, from the appearance of the car only, that the train on which the horses were brought to the place where the owner found them had not been derailed, and showed how the injury might have happened, and none of the employees in charge of the train were introduced as witnesses on the trial, to account for the injury, a verdict against the company was sustained by the evidence.

**Carried at "Owner's Risk"—Prima Facie Showing of Absence of Negligence.**—When loss or damage to goods occurs while they are in



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the possession of the carrier, though carried at "owner's risk," the carrier must make at least a prima facie showing that it was not caused by its negligence. So held in *South & North Ala. R. Co. v. Wilson*, 78 Ala. 587, 27 Am. & Eng. R. Cas. 41.

**Evidence Tending to Show Negligence in Packing or Loading.**—Where, in an action by a consignee against a common carrier on a common-law contract of affreightment, for failure to deliver property in good condition, the evidence tends to show that the goods were improperly and negligently packed or loaded on cars, the burden is on the defendant to show it was not at fault or negligent in and about the transportation and delivery of the goods, and, in the absence of such proof, the general affirmative charge should be given in favor of the plaintiff. So held in *McCarthy v. Louisville & N. R. Co.*, 102 Ala. 793, 14 So. 370.

**Boat Capsized—Injury to Freight—Deviation—Burden of Accounting for Property.**—In an action against a common carrier, where plaintiffs proved that defendant's boat, in which the property was being transported, was capsized, and the property damaged, and a portion of it carried by defendants to a place out of their course, it was held that the burden was thrown on defendant to account for the property. So held in *Day v. Ridley*, 16 Vt. 48.

**Fire Set by Locomotive—Condition and Use of Spark Arrester.**—In an action against a common carrier for loss of freight by fire while in transit, proof that the loss was caused by sparks from a locomotive establishes a prima facie case of negligence, which shifts the burden to the carrier to show the sufficiency and proper use of its spark arrester. *Fire Ass'n v. Loeb* (Tex. Civ. App.), 59 S. W. 617.

**Fire from Locomotive—Cotton on Platform Destroyed.**—In an action to recover for the value of cotton destroyed, while on a railroad platform, by fire started by the carelessness of men hired by the railroad's agents to load it, the burden is on the railroad to show that the loss was not due to its negligence. So held in *St. Louis, etc., Ry. Co. v. Martin* (Tex. Civ. App.), 35 S. W. 28.

**Cotton on Station Platform Injured by Fire—Burden on Carrier to Show Impossibility of Preventing Fire.**—Where cotton on a railroad platform, in course of delivery, was damaged by fire, the cause of which is not shown or explained, proof of the usual and ordinary diligence in such cases to safeguard the cotton will not avail the carrier as a defense. Besides proof of loss and diligence, the law requires the carrier to prove that the fire was purely accidental, and impossible to prevent. This necessarily involves proof of the cause of the origin of the fire; and, in the absence of such proof, the loss will be imputed to the fault of the carrier. So held in *Lehmann, Stern & Co. v. Morgan's, etc., Co.* (La.), 38 So. 873, 18 R. R. R. 559, 41 Am. & Eng. R. Cas., N. S., 559.

**Destroyed in Warehouse without Carrier's Fault.**—Where a railroad company, as a common carrier, is sued on its contract of carriage for a failure to safely carry and deliver the goods at the place of consignment, and sets up in defense that after the arrival of the goods they were stored in a warehouse, and were there destroyed by fire without its negligence or fault, the burden of proving this defense, including the loss by fire without negligence or fault on its part, is on the railroad. So held in *Wilson v. California Cent. R. Co.*, 94 Cal. 166; 29 Pac. 861.

**Injury from Defective Car—Burden of Proving Subsequent Accident beyond Carrier's Control.**—When the car is defective at the time of injury to freight transported in it, and the defect contributed to the injury, the onus is on the carrier to disprove negligence, and it must show that the defect arose, not from the insufficiency of the vehicle, but from some subsequent accident beyond its control. So held in *Empire Transportation Co. v. Wamsutta Oil R. & M. Co.*, 63 Pa. St. 14.

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**Fragile Freight—Breakage.**—But where freight is of so fragile a character that it is liable to break, even from careful handling, it seems that such fact may be considered by the jury as evidence to rebut the presumption of negligence which arises against the carrier from proof that the freight was delivered to it in good condition and arrived at its destination in a damaged condition. So held in *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, 24 Atl. 678.

**Alcohol Reduced in Strength—Failure to Connect Carrier with Any Fault.**—And in *Jordan v. American Express Co.*, 86 Me. 225, it is held that no action can be maintained against a common carrier for hire to recover damages for not safely carrying merchandise, when the proof fails to connect the carrier with any fault touching the articles intrusted to it for carriage. In this case the complaint was that the freight (alcohol) was reduced in strength in transit.

**Casks Broken—Leakage of Wine—Failure to Show Material of Casks.**—And in *Roth v. Hamburg-American Packet Co.*, 59 N. Y. Sup'r Ct. Rep. 49, 12 N. Y. Supp. 460, an action for the value of two casks of wine, it appeared that the casks were found on the arrival of the steamship to be in broken condition and the whole of their contents to have leaked out; that the bill of lading provided that the carrier should not be liable for breakage or leakage. It was held that, assuming the law to be that when casks or things of that nature are generally carried without breakage, if ordinary care is used, the fact of breakage leads to the presumption that ordinary care was not used, yet such presumption can be made only in regard to casks that are made of such material, and in such manner, that will give them the strength to resist the ordinary operations of the ship; yet if nothing be known or presumed as to the strength of the cask, no knowledge or experience would exist upon which it might appear probable that the casks would bear ordinary usage; that as the manner in which such two casks were made or the strength of their material were not shown, although proof on the subject was available, there could be no presumption as to their strength.

**Rebuttal—Evidence Merely Explanatory of Time, Place and Manner of Injury.**—In *Menner v. Delaware & H. Canal Co.*, 7 Pa. Sup'r Ct. 135, it is held that while injury to goods in transit is not negligence per se it is evidence of negligence; that its effect may be rebutted by showing that it is due to causes beyond the scope of the carrier's obligations; but is not rebutted by evidence merely explanatory of the time, place and manner of the injury; that evidence offered by way of explanation does not of itself throw on the shipper the burden of showing, by positive testimony, negligence on the part of the carrier; and that unless an explanation undeniably adequate arises from undisputed facts, it is for the jury, as judges of the credibility of the witnesses, the weight of the evidence, and the measure of care demanded by the circumstances, to determine whether it shall be accepted in discharge of the carrier's liability.

**Stock Injured in Transit.**—As a general rule, injury to stock while in transit being shown, the burden of proof is upon the carrier to show that it was not caused by its negligence. So held in *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659, 74 N. W. 192, 9 Am. & Eng. R. Cas., N. S., 669.

The rule that a prima facie case against a common carrier is made out by proof of delivery to it and its failure to deliver at destination of the freight, applies to live stock, except where the loss is caused by the vitality of the freight. So held in *McFall v. Wabash Ry. Co.*, 177 Mo. App. 477.

In an action against a carrier to recover for loss of or injury to live stock in transit, after proof of loss or injury there is a presumption of law that defendant was at fault, and the burden rests upon it of showing that it is not liable, by reason of the happening of some

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cause which the law recognizes as an excuse. So held in *Cooper v. Raleigh & G. R. Co.*, 110 Ga. 659, 18 Am. & Eng. R. Cas., N. S., 412.

Where plaintiff has shown injury to live stock while in the carrier's custody, the burden is on the carrier to show that it did not result from any negligence on the part of its servants or agents. So held in *Louisville & N. R. Co. v. Smitha* (Ala.), 40 So. 117, 19 R. R. R. 777, 42 Am. & Eng. R. Cas., N. S., 775.

Injury to the contents of a car may furnish ground for an inference of want of ordinary care in the transportation of the freight, although there may be no evidence of an accident to the train, nor any direct evidence of improper or negligent handling of the car; and this rule applies with proper limitations to live stock, but has no application in the case of injuries which are such as animals voluntarily inflict upon each other, or which cannot be accounted for, or which can be satisfactorily explained on any other grounds than that of negligence in managing the train, nor does it apply in cases of death from natural causes, or causes entirely unknown. So held in *Schaeffer v. Philadelphia & Reading Railroad*, 168 Pa. St. 209, 31 Atl. 1088.

Where cattle were delivered to a railroad without any limitation of its common-law liability, and without the shipper assuming any of the hazards of shipment, or being required or permitted to accompany or care for the cattle, and it is shown that the cattle were delivered at their destination in an injured condition, the burden is on the railroad to prove that the cause of injury was one for which it is not liable. So held in *Chicago, etc., Ry. Co. v. Woodward* (Ind.), 72 N. E. 558, 17 R. R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7.

**Imputation of Negligence.**—On proof that animals delivered to the defendant carrier in good condition were not delivered safely and within a reasonable time, the burden is on the carrier to excuse itself from the imputation of negligence. So held in *Louisville & N. R. Co. v. Smitha* (Ala.), 19 R. R. R. 775, 42 Am. & Eng. R. Cas., N. S., 775, 40 So. 117.

**Live Stock—Proof of Carrier's Sole Custody.**—Where a railroad company, as a common carrier, had the sole custody of animals, from the time of their delivery to it until they were discovered to be injured, the burden of proof is upon it to show that it exercised ordinary care in their carriage, in other words, that it is free from negligence which, as an efficient contributing cause, brought about the damage. So held in *Adams Express Co. v. Bratton*, 106 Ill. App. 563.

**Horses Seriously Injured.**—Where, in an action against a carrier for injuries to a shipment of horses, the evidence showed that the horses were seriously injured, the burden of accounting for the injuries was on the carrier, and its negligence was presumed. *Louisville & N. R. Co. v. Brown* (Ky.), 24 R. R. R. 81, 47 Am. & Eng. R. Cas., N. S., 81, 90 S. W. 567.

**Animal Delivered by Carrier in Lame and Diseased Condition—Act of God.**—Proof that an animal was delivered to a common carrier in sound, healthy condition, and when delivered at destination is lame or diseased, throws the burden upon the carrier to prove that the injury resulted from an act of God or the public enemy. So held in *Dow v. Steam Packet Co.*, 84 Me. 490, 24 Atl. 945.

**Burning of Car.**—In an action for injuries to a live stock shipment caused by the burning of the car in which the stock was being transported, plaintiff showed the burning and damages, and that the fire was not caused by the negligence of his employee in charge of the stock, and it was held that a prima facie case had been made against the railroad company, and that, the company having failed to refute it, plaintiff was entitled to recover. *St. Louis & F. R. Co. v. Parmer* (Tex.), 30 S. W. 1109.

**Combustible Material Permitted to Be Used in Car.**—If a railroad permits straw or other combustible material to be used on the

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cars and a fire originates therefrom by which animals are injured, a presumption of negligence arises against the company, which it must rebut in order to relieve itself from liability for the loss. So held in *Trace v. Pennsylvania Railroad*, 26 Sup'r Ct. 466.

## 2. Delay—Absence of Negligence.

Thus, where it is shown that the time consumed in transporting the freight was unusually and unreasonably long, the carrier must introduce evidence to show that such delay was due to some cause for which it is not responsible. *Galena, etc., R. Co. v. Rae*, 18 Ill. 488; *Cleveland, etc., R. Co. v. Heath* (Ind. App.), 53 N. E. 198; *St. Clair v. Chicago, etc., R. Co.*, 80 Iowa 304, 45 N. W. 570; *Place v. Union Express Co.*, 2 Hilt. (N. Y.) 19; *Wells, etc., Co. v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824; *Mann v. Birchard*, 40 Vt. 326.

**Delay in Delivery of Cattle.**—On proof of delay in the delivery of cattle by a railroad a prima facie case was made out against it, and the burden of proof then rested upon it to show that it was not responsible for the delay. So held in *Bosley v. Baltimore & O. R. Co.* (W. Va.), 10 R. R. R. 458, 33 Am. & Eng. R. Cas., N. S., 458, 46 S. E. 613.

**Excuse for Delay.**—In an action against a carrier for delay in the shipment of cattle, the burden of proof was upon the carrier to show an excuse for the delay. So held in *Tiller & Smith v. Chicago, B. & O. Ry. Co.* (Iowa), 24 R. R. R. 581, 47 Am. & Eng. R. Cas., N. S., 581, 112 N. W. 631.

**Unusual and Unexplained Delay.**—Unusual and unexplained delay in transporting freight and failure to deliver it according to the general course of business is prima facie evidence of negligence on the part of the carrier. So held in *Mann v. Birchard*, 40 Vt. 326.

**Unusual Time Consumed in Transportation.**—Evidence that it took twenty-four hours to transport cattle to a certain point, when the usual time was from thirteen to fifteen hours, and that the train was delayed at more than one place from two to four hours, is sufficient to raise a presumption of the carrier's negligence, in an action by the shipper. So held in *Anderson v. Atchison, F. & S. F. Ry. Co.* (Mo. App.), 3 R. R. R. 42, 26 Am. & Eng. R. Cas., N. S., 707.

**Delivered in Damaged Condition after Unreasonable Delay.**—In *Hinkle, Craig & Co. v. Southern Ry. Co.*, 126 N. Car. 932, 36 S. E. 675, it is held that where cattle are received by a railroad as a common carrier for transportation and are not reasonably and safely delivered by it at their destination, that is not delivered at all, or delivered in a damaged condition, and after unreasonable delay, the plaintiff's case against the company is made out.

**Fire Occurring without Fault—Delay Causing Exposure of Freight.**—In *Deming & Co. v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306, 17 S. W. 89, it appeared that plaintiff's cotton was burned while on board car awaiting shipment; that the fire occurred without fault of the carrier, but that had it not been for unusual delay in removing the car and the breaking of machinery in the effort to remove it, the cotton would not have been in reach of the fire. It was held that the burden of proof was upon the carrier to explain such delay and breaking of machinery, so as to excuse itself from the imputation of negligence.

## 3. Act of God or Public Enemy—Proximate Cause—Absence of Negligence.

Where the carrier claims that the loss or injury was the result of an act of God or the public enemy, the burden rests upon it of proving that the cause so set up as a defense was the proximate one, and that it was guilty of no negligence, of commission or omission, with respect to protecting the freight from an act of

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God or the public enemy. *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 269; *Central R., etc., Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838; *Richmond, etc., R. Co. v. White*, 88 Ga. 805, 15 S. E. 802; *Davis v. Wabash, etc., R. Co.*, 89 Mo. 340, 1 S. W. 327; *Leonard v. Hendrickson*, 18 Pa. St. 40.

**Loss from Act of God.**—Under an ordinary bill of lading, with no special exceptions, if the goods are lost by the act of God, the burden is upon the carrier to prove that his negligence did not contribute to cause the loss. So held in *Ryan v. M., K. & T. Ry. Co.*, 65 Tex. 13, 23 Am. & Eng. R. Cas. 703.

**Injury Occasioned by Natural Dangers Incident to Navigation.**—It is not sufficient for the carrier to render it probable that the injury to freight was occasioned by one of the natural dangers incident to the navigation. It is incumbent upon him to show that he has used diligence and proper skill to avoid the accident, and that it was unavoidable. So held in *Steamer Jean Webre v. Kandall, Carter & Co.*, 12 La. Ann. 446.

#### 4. Carrier Has Burden of Proving Loss Was Caused By "Proper Vice" of Stock.

After the plaintiff has introduced evidence tending to show that the injury to his live stock for which the action is brought was sustained while it was in the carrier's possession, the carrier must offer evidence tending to prove that the damage was attributable to the vitality and propensities of the animals.

**United States.**—*Missouri Pac. R. Co.*, 41 Fed. Rep. 913, 18 Am. & Eng. R. Cas., N. S., 412.

**Alabama.**—*Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

**Georgia.**—*Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 17 R. R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7.

**Illinois.**—*Baltimore, etc., R. Co. v. Fox*, 113 Ill. App. 180; *Toledo, etc., R. Co. v. Durkin*, 76 Ill. 395.

**Indiana.**—*Chicago, etc., R. Co. v. Woodward (Ind.)*, 72 N. E. 558.

**Iowa.**—*Chapin v. Chicago, etc., R. Co.*, 79 Iowa 582, 44 N. W. 820; *McCoy v. Keokuk, etc., R. Co.*, 44 Iowa, 424.

**Maine.**—*Dow v. Portland Steam Packet Co.*, 84 Me. 490, 24 Atl. 945.

**Massachusetts.**—*Evans v. Fitchburg R. Co.*, 111 Mass. 1424.

**Minnesota.**—*Hull v. Chicago, etc., R. Co.*, 41 Minn. 510, 40 Am. & Eng. R. Cas. 104, 43 N. W. 391; *Lindsley v. Chicago, etc., R. Co.*, 36 Minn. 539, 31 Am. & Eng. R. Cas. 86, 33 N. W. 7; *Smith v. Great Northern R. Co.*, 92 Minn. 11.

**Missouri.**—*Cash v. Wabash R. Co.*, 81 Mo. App. 109; *Doan v. St. Louis, etc., R. Co.*, 38 Mo. App. 408.

**Montana.**—*Nelson v. Great Northern R. Co.*, 28 Mont. 297, 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311, 72 Pac. 642.

#### 5. Carrier Need Not Show Precise Cause of Death of or Injury to Stock.

But after the carrier has thus shown that the loss was due to the vitality of the freight, it is not, as a general rule, required to show the exact cause of the injury. *Burke v. United States Express Co.*, 87 Ill. App. 505; *Illinois Cent. R. Co. v. Teams*, 75 Miss. 147, 21 So. 706; *Chicago, etc., R. Co. v. Abels*, 60 Mo. 1017, 21 Am. & Eng. R. Cas. 105.

#### 6. Stock Injured—Human Agency Shown—Common Law or Contract Exemption.

When the plaintiff has shown that the loss of or injury to his live stock, sustained while in the carrier's custody, was attributable to human agency, the burden is upon the carrier to prove that it is within some common-law or contract exemption; and unless this burden is satisfactorily sustained it cannot escape liability.



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**Alabama.**—Richmond, etc., R. Co. *v.* Trousdale, 99 Ala. 389, 13 So. 23; Western Railway Co. *v.* Harwell, 91 Ala. 340, 8 So. 649.

**Illinois.**—Baltimore & Ohio S. W. R. Co. *v.* Fox, 13 Ill. App. 180; Adams Express Co. *v.* Bratton, 106 Ill. App. 505; Burke *v.* United States Express Co., 87 Ill. App. 505.

**Kentucky.**—Louisville & N. R. Co. *v.* Brown (Ky.), 90 S. W. 567.

**Louisiana.**—Kirk *v.* Folsom, 23 La. Ann. 584; Mahon *v.* Steamer Olive Branch, 18 La. Ann. 107; Price, Frost & Co. *v.* Ship Uriel, 10 La. Ann. 413.

**Michigan.**—Bonfiglio *v.* Lake Shore, etc., R. Co., 125 Mich. 476.

**Minnesota.**—Boehl *v.* Chicago, etc., R. Co., 44 Minn. 191, 46 N. W. 333.

**Missouri.**—Crow *v.* Chicago & A. R. Co., 57 Mo. App. 135; George *v.* Chicago, etc., R. Co., 57 Mo. App. 358.

**New York.**—Hayman *v.* Philadelphia, etc., R. Co., 8 N. Y. St. 86.

**Tennessee.**—Louisville, etc., R. Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. 311.

**Texas.**—Missouri Pac. R. Co. *v.* Scott (Tex. Civ. App.), 26 S. W. 239.

### 7. Freight Not Accounted for—Presumption of Negligence.

Where the carrier not only fails to deliver freight, but also fails or refuses to give an account as to the manner or cause of its loss, it must be presumed that such cause was the carrier's negligence. Alabama Great So. R. Co. *v.* Little, 71 Ala. 611; Adams Express Co. *v.* Walker (Ky.), 24 R. R. R. 145, 47 Am. & Eng. R. Cas., N. S., 145, 83 S. W. 106; George *v.* Chicago, R. I. & P. Ry. Co., 57 Mo. App. 358; Kirby *v.* Adams Express Co., 2 Mo. App. 369; Sheldon *v.* Robinson, 7 N. H. 157; Blum *v.* Monahan, 36 N. Y. Misc. Rep. 179, 73 N. Y. Supp. 162; Canfield *v.* Baltimore & Ohio R. Co., 93 N. Y. 532; 16 Am. & Eng. R. Cas. 152, 45 Am. Rep. 268; Newstadt *v.* Adams, 5 Duer (N. Y.), 43; Black *v.* Goodrich Transportation Co., 55 Wis. 319, 13 N. W. 244.

**Proof of Receipt of Goods on Vessel and Their Loss.**—To sustain an action against a common carrier for failure to deliver property intrusted to it for transportation, it is sufficient to prove that the property was received by its employees, on its vessel, for transportation, and that while the carrier was engaged in transporting the same it was lost, or was not safely delivered to the consignee. So held in Merritt *v.* Earle, 31 Barb. (N. Y.), 38.

**Non-Delivery of Package of Money by Stage Driver.**—Where the driver of a stage coach, in the general employ of the proprietors of the coach, was in the habit of transporting packages of money for a small compensation, which was uniform whatever might be in the amount of the package, he was a bailee for hire in transporting such packages, and having received money to transport, the burden is on him to excuse a non-delivery. So held in Sheldon *v.* Robinson, 7 N. H. 157.

**Failure to Deliver Two of a Number of Cattle.**—Proof of the receipt of a certain number of cattle by the carrier and its failure to deliver two of such number, together with proof of the value of the missing steers, makes out a prima facie right of the shipper to recover. So held in George *v.* Chicago, R. I. & P. Ry. Co., 57 Mo. App. 358.

**Disappearance of One of Three Dogs from Crate.**—Where three dogs, securely crated, were delivered to a carrier, and only two remained in the crate when it was delivered at its destination, and no account was given by the carrier of the missing animal, negligence upon the part of the carrier will be presumed. So held in Adams Express Co. *v.* Walker (Ky.), 24 R. R. R. 145, 47 Am. & Eng. R. Cas., N. S., 145, 83 S. W. 106.

**Delay in Calling for Valise—Unexplained Loss of Contents—Carrier Liable as Warehouseman.**—In Aaronson *v.* Pennsylvania R. Co., 23 N. Y. Misc. Rep. 666, it appeared that a common carrier delivered



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to the owner of a properly closed valise a shipping receipt stating, "Property not removed by the person or party entitled to receive it, within twenty-four hours after its arrival at destination, may be kept in the car, depot or place of delivery of the carrier at the sole risk of the owner of said property." When, eighteen days after its arrival, the owner received and opened the valise, its contents were gone. The carrier offered no explanation of the loss, but showed that valise had been carried in a sealed car, whose seals were not broken when it arrived, and that all the goods of the car were placed upon arrival on the floor of a dock, which had been well guarded. It was held that the carrier was liable as warehouseman for the unexplained loss.

**Passenger's Box of Pictures Stored in Hold of Vessel—Failure to Enter on Bill of Lading or Give Notice as to Nature of Contents—Liable as Bailee.**—In *Wheeler v. Oceanic Steam Navigation Co.*, 125 N. Y. 155, 26 N. E. 248, it appeared that plaintiff, an artist, took passage to New York on one of defendant's ships; that in addition to her ordinary baggage she delivered to the ship for transportation a box with iron hinges and corner clasps and closed by a lock, which contained valuable pictures. Besides the address, the box was marked "studio." Plaintiff in no way attempted to deceive defendant as to its true character, or to make it appear to be personal baggage. It was not entered upon the bill of lading, but was put in the hold of the vessel, which did not stop after sailing until it reached its port of destination. Upon arrival the trunks and packages of the passengers were landed upon the dock, each one being left to find and collect his own. Plaintiff's package was never delivered to her. In an action to recover for the loss of it on the ground of negligence on the part of the master of the vessel, the complaint was dismissed because of plaintiff's failure to notify the master of the true character and value of the contents of the box, and to have it entered on the bill of lading, as required by U. S. Rev. St., § 4281. It was held that this was error; that non-delivery at the port of destination was prima facie evidence of negligence, and defendant was liable as bailee.

**Burden of Proving Delivery to Consignee.**—If a common carrier receives goods, and contracts to deliver them to the consignee, the burden of proving such delivery is upon the carrier. So held in *Wheeler v. St. Louis & S. W. R. Co.*, 3 Mo. App. 358.

**Loss of Goods.**—Where goods are lost while in the custody of a common carrier, whatever may be the terms of the shipping contract, the law will presume that they were lost through the fault of the carrier, unless the contrary is shown. So held in *Kirby v. Adams Express Co.*, 2 Mo. App. 369.

**Failure to Deliver Any Portion of Freight.**—In *Canfield v. Baltimore & Ohio R. Co.*, 93 N. Y. 532, 16 Am. & Eng. R. Cas. 152, 45 Am. Rep. 268, it is held that the failure of the carrier to deliver the property or any portion thereof to the consignee on demand at the place of destination is prima facie evidence of negligence, which, in the absence of any evidence excusing the non-delivery, presents a question of fact for the jury.

**Mere Unexplained Disappearance of Freight.**—Where a common carrier admits the receipt of plaintiff's goods it must show affirmatively that their loss was not caused by its negligence; and their mere disappearance cannot exonerate it. So held in *Blum v. Monahan*, 36 N. Y. Misc. Rep. 179, 73 N. Y. Supp. 162.

**Special Contract.**—When goods are lost or damaged, while in the custody of a common carrier under a special contract, and it gives no account or explanation of the loss or injury, a presumption or negligence follows, rendering it liable. So held in *Alabama Great So. R. Co. v. Little*, 71 Ala. 611.

**Refusal to Deliver without Explanation.**—Proof of delivery of goods to a common carrier for transportation and acceptance of them by the carrier, and of a demand of them at a proper time and place,

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and of a refusal to deliver them, without explanation, is sufficient, in the first instance, to entitle plaintiff to recover. So held in *Newstadt v. Adams*, 5 Duer (N. Y.) 43.

**Admission of Loss.**—The non-delivery of goods intrusted to a carrier, and its admission that the same are lost so that it cannot make delivery, is presumptive evidence of negligence on its part. So held in *Black v. Goodrich Transportation Co.*, 55 Wis. 319, 13 N. W. 244.

**Liability Limited—Burden of Proving Landing on Dock.**—In *Browning v. Goodrich Transportation Co.*, 78 Wis. 391, it appeared that a carrier received goods under a contract relieving it from liability "for the dangers of navigation, fire, collision or delivery, except to land goods on dock or pier." In an action to recover the value of the goods, it appearing that they were never delivered to the consignee, it was held that the burden of proof was upon the carrier to show that they were landed on the dock or pier at their destination.

**Portion of Freight Saved from Freshet—Failure to Account for Other Portion—Deduction on Account of Conjectural Damage by Freshet.**—In *Charlotte, C. & A. R. Co. v. Wooten, Hill & Wooten*, 87 Ga. 203, 13 S. E. 509, it is held that though goods saved by a common carrier from the perils of a freshet were damaged by passing through the freshet, yet if some not saved are unaccounted for, and it is not shown that the freshet caused their loss, or what their condition was when they disappeared, a recovery for their value may be had against the carrier without deducting anything for conjectural damage which they may have sustained by reason of the freshet before their loss occurred.

**Warehouseman's Liability—Burden of Proving Change of Relation.**—A common carrier must deliver to the owner or consignee, and it cannot relieve itself of its liability, as such, until the freight is delivered to the owner or consignee, or to a warehouseman, for storage; and there must be some open act of delivery, to change the liability of a carrier to that of a warehouseman, and the burden of proving this is upon the defendant carrier. So held in *Chicago & Rock Island R. Co. v. Warren*, 16 Ill. 502.

**Failure to Show Particular Lot of Sugar Was Loaded on Vessel.**—In *The Willie D. Sandhovel* (D. C.), 92 Fed. Rep. 286, it is held that while the burden is on the carrier to show that goods receipted for were not received by it, yet where, in an action to recover for their non-delivery, there was no evidence that a particular lot of sugar in barrels was actually loaded on a vessel, and no part of the lot was on board at the first port, and the evidence was inconsistent with the theory that it was lost or stolen, the carrier will not be liable.

**Failure to Find Box Delivered to Carrier—No Evidence Introduced by Carrier.**—In *Morley v. Eastern Express Co.*, 116 Mass. 97, it appeared that A. delivered a box containing his property to a common carrier at one town to be carried to another town; that the box was directed to B. at the later town; that A. had made efforts to find the box, but had not been able to do so; that he had made inquiries at both towns at the offices of the carrier; that he had not seen the box since he sent it; and that he had inquired of B. about the box. It was held that this was not sufficient evidence to maintain an action by A. against the carrier for the value of the box and its contents, although the carrier put in no evidence.

### 8. Responsibility as Warehouseman Only.

So, where the relation of common carrier is once shown to have existed if the carrier seeks to escape liability on the ground that its responsibility for the safety of the freight, at the time the loss or

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injury complained of occurred, was that of a warehouseman only, it has the burden of producing evidence in support of such contention. *Peoria, etc., R. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. 59.

### 9. Possession as Warehouseman—Presumption of Negligence.

The mere fact that goods are injured while the carrier is holding them as a warehouseman does not give rise to a presumption of negligence. *Strauss v. Wilson*, 17 Fed. Rep. 701; *Collins v. Alabama Great So. R. Co.* (Ala.), 16 So. 140; *Jackson v. Sacramento Valley R. R. Co.*, 23 Cal. 269; *Chicago, etc., R. Co. v. Kendall*, 72 Ill. App. 105; *Cass v. Boston & Lowell R. Co.*, 14 Allen (Mass.) 448; *Lamb v. Western R. Corp.* 7 Allen (Mass.), 98.

**Depositories for Hire—Loss of Goods.**—In the case of depositories for hire, where the goods are lost, the authorities are not agreed as to whether the burden of proof of negligence is on the owner of the goods or of reasonable care on the depository. In England it is held that such burden is upon the owner, but the courts in this country have in some cases held otherwise. *Boies v. Hartford & New Haven R. Co.*, 37 Conn. 272.

**Voluntary Bailee—Loss of Goods.**—In an action against a railroad company to recover for the loss of goods, under a count which seeks to recover against the defendant as a voluntary bailee, the burden is upon plaintiff to show negligence on the part of the defendant, and, in the absence of proof showing negligence, the plaintiff is not entitled to recover. So held in *Frederick v. Louisville & N. R. Co.*, 133 Ala. 486, 31 So. 968.

**Mere Proof of Theft from Depot.**—Where the plaintiff in an action against a railroad company to recover the value of goods deposited in their depot and alleged to have been lost through defendant's neglect, proves simply that the goods were stolen from such depot, and fails to offer any evidence of a want of ordinary care on the part of defendants, the judge may properly rule that the evidence is insufficient to maintain the action. So held in *Lamb v. Western R. Corp.*, 7 Allen (Mass.), 98.

**Theft of Goods by Warehouseman's Employee.**—The burden of showing that goods were stolen or embezzled by a warehouseman's store-keeper or servant, by reason of the warehouseman's negligence, is upon their owner. So held in *Schmidt & Webb v. Blood & Green*, 9 Wend. (N. Y.) 268.

**Defense Not Implicating Bailee in Negligence.**—It is a sufficient defense if the bailee accounts for a loss in a way not implicating himself in negligence unless the bailor proves negligence. So held in *Farnham v. Camden & Amboy R. Co.*, 55 Pa. St. 53.

**Whether Lost during Transportation or from Warehouse.**—In an action against a railroad company, as a common carrier, for loss of goods, where the proof renders it uncertain whether the goods were lost while being transported, or after being deposited in the warehouse, and there is no proof of want of ordinary care, judgment against the carrier will be reversed. So held in *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 269.

**Proof of Demand and Refusal to Deliver.**—A prima facie case of negligence is made out against a warehouseman who refuses to deliver property stored with him, upon proof of demand and refusal. So held in *Wilson v. Southern Pac. R. Co.*, 62 Cal. 164.

### 10. Warehouseman—Prima Facie Case—Burden of Proving Absence of Negligence.

After the shipper makes out a prima facie case against the defendant carrier, the latter must show the exercise of ordinary care on its part for the safety of goods in its custody as a warehouseman,

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but is not bound to show the origin of the loss or injury. *Wilson v. California Cent. R. Co.* (Cal.), 29 Pac. 861; *Boies v. Hartford, etc., R. Co.*, 37 Conn. 272; *Almand v. Georgia, etc., Co.* (Ga.), 22 S. E. 674; *Georgia, etc., R. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287; *Cass v. Boston, etc., R. Co.*, 14 Allen (Mass.), 448; *Lamb v. Western R. Corp.*, 7 Allen (Mass.), 98; *Aaronson v. Pennsylvania R. Co.*, 52 N. Y. Supp. 95; *Wardlaw v. South Carolina R. Co.*, 11 Rich. (S. Car.), 337.

**Failure of Bailee to Show Proper Precautions.**—In *The Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121, it is held that although in an action against a bailee for loss of or damage to goods by accident the burden of proof of negligence rests upon plaintiff, yet the nature of the accident itself may afford prima facie proof of negligence; that if it is one which, in the ordinary course of events, would not have happened but for the want of proper care on the part of the bailee, it is incumbent upon him to show that he took proper precautions, and his failure to furnish this proof, which, if it existed, would have been in his power, may subject him to the inference that such precautions were omitted.

**Failure to Deliver Goods on Demand.**—Where a railroad company failed to deliver on demand goods intrusted to it, which it was liable to keep as a warehouseman for hire, or did not account for such failure, prima facie negligence would be imputed to it, and the burden was on it to prove that the loss was occasioned without any want of ordinary care on its part. So held in *Southern Ry. Co. v. Aldredge & Shelton* (Ala.), 16 R. R. R. 519, 39 Am. & Eng. R. Cas., N. S., 519, 38 So. 805.

**Burden of Proving Loss without Fault.**—In an action of contract against a warehouseman to recover for a failure to deliver goods, which are admitted or proved to have been received by them, and not delivered upon demand, the burden of proof is on them to show that the goods have been lost without their fault. So held in *Cass v. Boston & Lowell R. Co.*, 14 Allen (96 Mass.), 448.

**Baggage Stolen—Burden of Proving Storage in Secure Warehouse.**—In an action against a carrier for loss of a passenger's baggage, which had been stolen from the place where it had been deposited by the carrier, at the place of destination, if the latter seeks to avoid liability as a carrier, and place its defense on the ground that it is only liable as a warehouseman, the burden of proof is upon it to show the baggage was stored in a safe and secure warehouse. So held in *Bartholomew v. St. Louis, J. & C. R. Co.*, 53 Ill. 227.

**Failure of Railroad to Deliver Portion of Shipment Deposited by It in Warehouse—Failure to Explain.**—In *Boies v. Hartford & New-Haven R. Co.*, 37 Conn. 272, it appeared that defendant railroad company having transported for plaintiff eighteen bales of cotton, held the same at their warehouse to be called for by him, but delivered to him but sixteen, the two other bales having been lost in some manner. In assumpsit against the defendant as warehouseman for the non-delivery of the two bales, plaintiff having offered no proof of negligence except what was to be inferred from the receipt and non-delivery of the bales, and defendant not having explained how the bales had been lost or in any manner accounted for them, nor shown that it had exercised reasonable care to prevent their loss, the court ruled that defendant, to deliver itself from responsibility for the goods, were bound to prove either a delivery to the plaintiff or that it had exercised ordinary care in keeping them; and that under the circumstances, the burden was not on plaintiff to show the manner of defendant's negligence by means of which the loss occurred. It was held that this ruling was correct.

### 11. Contributory Negligence—Proximate Cause.

A defendant carrier has the burden of establishing that the alleged contributory negligence of the shipper, in loading or making, or

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otherwise affecting the freight, was the proximate cause of the damage sued for. *Menner v. Delaware, etc., Canal Co.*, 7 Pa. Sup'r Ct. 135; *Belcher v. Missouri, etc., R. Co.*, 92 Tex. 593, 50 S. W. 559.

**Possibility of Plaintiff Preventing Damage.**—The burden of proof is upon a defendant carrier to show that any part of the damages occasioned to plaintiff by defendant's negligence with respect to the freight could have been prevented by plaintiff, and what part, if any. So held in *Belcher v. Missouri, K. & T. Ry. Co.*, 92 Tex. 593, 50 S. W. 559.

**Burning of Stock Car—Failure of Shipper to Remain on Train.**—Mere failure of a shipper of live stock to remain on the train as required by the shipping contract does not preclude him recovering for the loss of the stock by the burning of the car in which it was carried, where his contract did not require him to ride in such car, but in the caboose. Under such circumstances it is not required of the shipper to prove the loss was not caused by his failure to remain on the train, nor by his failure to care for the property while in transit; and he could recover on proof that the fire was not due to any act or neglect of his. So held in *Faust v. Chicago & N. W. Ry. Co.*, 104 Iowa, 241, 73 N. W. 623.

**Freight Carried on Deck—Shipper's Consent.**—The ship-owner has the burden of proving that the shipper consented that his property might be carried on deck. So held in *The Peytona (C. C.)*, Fed. Cas. No. 11,058.

**Shipper Required by Contract to Do Something as Condition Precedent to Recovery.**—Where the shipping contract contains a lawful provision requiring the shipper to do something as a condition precedent to recovery, then the burden of showing the performance of such condition rests upon the shipper, and if he fail to show performance, he must fail of recovery. So held in *Kalina & Cizek v. Union Pac. R. Co. (Kan.)*, 76 Pac. 438.

## 12. Limited Liability—Burden of Proving Existence of Special Contract.

A defendant carrier has the burden of establishing the existence of the special contract, where it sets up as a defense to an action for loss of or injury to freight a provision of such contract, under which it claims it is exempt from liability. In the absence of evidence to the contrary, it is to be assumed that goods accepted by a carrier for transportation are taken under the responsibility cast upon the carrier by the common law. So held in *Park v. Preston*, 108 N. Y. 434.

**Validity of Contract—Lex Loci.**—Where a contract for the carriage of a dog, made in Ohio, limiting the carrier's common-law liability, would have been invalid in Kentucky, under Const., § 196, forbidding carriers to contract away their common-law liability, the carrier should show, in order to protect itself, under such contract, not only that the contract was valid under the law of Ohio, but that the loss of the dog, constituting the non-performance of the contract, also occurred there. So held in *Adams Express Co. v. Walker (Ky.)*, 24 R. R. R. 145, 47 Am. & Eng. R. Cas., N. S., 145, 83 S. W. 106.

A clause in a through bill of lading, exempting the carrier "from damages or loss by fire while in depot," made in the state of Tennessee by a connecting road, being illegal in Texas, will not be passed upon in absence of allegation and proof that such limitation was legal where executed. So held in *International & G. N. R. Co. v. Moody*, 71 Tex. 614.

## 13. Special Contract—Burden of Proving Loss within Exemption Clause.

A common carrier relying on a special contract to exempt it from liability for loss or injury to freight, has the burden of showing that



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such loss or injury falls within the exemption clause set up as a defense.

**United States.**—*Argo Steamship Co. v. Seago* (C. C. A.), 101 Fed. Rep. 999; *Bearse v. Ropes*, 1 Sprague (U. S.) 331; *Bazin v. Liverpool, etc., Steamship Co.* (U. S.), Fed. Cas. No. 1,152; *Christie v. The Craigton*, 41 Fed. Rep. 62; *Cumming v. The Barracouta*, 40 Fed. Rep. 498; *Doherr v. Houston* (C. C. A.), 128 Fed. Rep. 594; *The Friesland*, 104 Fed. Rep. 99; *Hooper v. Rathbone, Taney* (U. S.) 519; *Hunt v. The Cleveland* (U. S.), Fed. Cas., No. 6,885; *Insurance Co. of North American v. Eastern, etc., Transp. Co.*, 97 Fed. Rep. 653; *King v. Shepherd*, 3 Story (U. S.) 349; *The Mascotte*, 51 Fed. Rep. 605; *The Ocean Wave*, 3 Biss. (U. S.) 317; *The Polynesia*, 16 Fed. Rep. 702; *Turner v. The Black Warrior* (U. S.), Fed. Cas. No. 14,253; *The Warren Adams*, 74 Fed. Rep. 413.

**Alabama.**—*Alabama, etc., R. Co. v. Little*, 71 Ala. 611; *Grey v. Mobile Trade Co.*, 55 Ala. 387; *Louisville, etc., R. Co. v. Cowherd*, 120 Ala. 51, 23 So. 793; *Montgomery, etc., R. Co. v. Moore*, 51 Ala. 394; *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537; *Nashville, etc., R. Co. v. Parker*, 123 Ala. 683; *Steele v. Townsend*, 37 Ala. 247; *Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

**Arkansas.**—*St. Louis, etc., R. Co. v. Lesser*, 46 Ark. 236.

**Connecticut.**—*Mears v. New York, etc., Co.*, 75 Conn. 171.

**Georgia.**—*Savannah, etc., R. Co. v. Hoffmayer*, 75 Ga. 410; *Southern Express Co. v. Newby*, 36 Ga. 635.

**Illinois.**—*Toledo, etc., R. Co. v. Hamilton*, 76 Ill. 393; *Western Transp. Co. v. Newhall*, 24 Ill. 466.

**Indiana.**—*Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129.

**Kansas.**—*Falina v. Union Pac. R. Co.*, 69 Kan. 172.

**Louisiana.**—*Edwards v. Steamer Cahawba*, 14 La. Ann. 224.

**Maine.**—*Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462.

**Maryland.**—*Baltimore, etc., R. Co. v. Brady*, 32 Md. 333.

**Massachusetts.**—*Alden v. Pearson*, 3 Gray (Mass.) 342.

**Michigan.**—*Bonfiglio v. Lake Shore, etc., R. Co.*, 125 Mich. 476; *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79.

**Minnesota.**—*Hinton v. Eastern R. Co.*, 72 Minn. 339; *Hull v. Chicago, etc., R. Co.*, 41 Minn. 510; *Lindsley v. Chicago, etc., R. Co.*, 36 Minn. 539; *Shriner v. Sioux City, etc., R. Co.*, 24 Minn. 506.

**Mississippi.**—*Johnson v. Alabama, etc., R. Co.* (Miss.), 11 So. 104; *Mobile, etc., R. Co. v. Tupelo Fur. Mfg. Co.*, 67 Miss. 35, 7 So. 279; *Southern Express Co. v. Moon*, 39 Miss. 822.

**Missouri.**—*Flynn v. St. Louis, etc., R. Co.*, 43 Mo. App. 424; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Schutter v. Adams Express Co.*, 5 Mo. App. 316; *Witting v. St. Louis, etc., R. Co.*, 28 Mo. App. 103; *Wolf v. American Express Co.*, 43 Mo. 421.

**Montana.**—*Nelson v. Great Northern R. Co.*, 28 Mont. 297.

**Nebraska.**—*Pennsylvania R. Co. v. Kennard Glass, etc., Co.*, 59 Neb. 435.

**New Hampshire.**—*Hall v. Cheney*, 36 N. H. 26.

**New York.**—*Arend v. Liverpool, etc., Steamship Co.*, 64 Barb. (N. Y.), 118; *Bowden v. Fargo*, 22 N. Y. Supp. 890; *Fenn v. Simpson*, 4 E. D. Smith (N. Y.), 276; *Koeningsheim v. Hamburg American Packet Co.*, 12 Daly (N. Y.), 123; *Newstadt v. Adams*, 5 Duer (N. Y.) 43; *Robinson v. New York, etc., Steamship Co.*, 63 N. Y. App. Div. 211.

**Ohio.**—*Davidson v. Graham*, 2 Ohio St. 131; *Gaines v. Union Transp., etc., Co.*, 28 Ohio St. 418; *Graham v. Davis*, 4 Ohio St. 363; *United Express Co. v. Packman*, 28 Ohio St. 144.

**Pennsylvania.**—*Schaeffer v. Philadelphia, etc., R. Co.*, 168 Pa. St. 209; *Verner v. Sweitzer*, 32 Pa. St. 208.

**South Carolina.**—*Baker v. Brinson*, 9 Rich. L. (S. Car.), 201; *Cameron v. Rich*, 4 Strobb. L. (S. Car.), 168; *Crawford v. Southern R. Co.*, 56 S. Car. 136; *Johnstone v. Richmond, etc., R. Co.*, 39 S.



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Car. 55, 17 S. E. 512; Slater *v.* South Carolina R. Co., 29 S. Car. 96; Swindler *v.* Hilliard, 2 Rich. L. (S. Car.), 286; Wallingford *v.* Columbia, etc., R. Co., 26 S. Car. 258.

**Texas.**—Galveston, etc., R. Co. *v.* Efron (Tex. Civ. App.), 38 S. W. 639.

**Wisconsin.**—Browning *v.* Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428; Detroit, etc., R. Co. *v.* Farmers', etc., Bank, 20 Wis. 122; Falvey *v.* Northern Transp. Co., 15 Wis. 129.

The carrier, in order to escape liability for loss or injury to freight transported under special contract, must show not only a loss or injury from a cause within the limitation, but also that it was occasioned without negligence on its part. South & North Ala. R. Co. *v.* Henlien, 52 Ala. 606.

**Robbery, Riots, or Strikes.**—Defendant, in an action for injury to goods while in its possession as carrier, has the burden of showing its exemption from liability, under the provision of the bill of lading that it should not be liable for injury by robbery, riots, and strikes. So held in Louisville & N. R. Co. *v.* Dunlap (Ala.), 24 R. R. R. 453, 47 Am. & Eng. R. Cas., N. S., 453, 41 So. 826.

**Exemption from Loss by Fire.**—Where cotton was shipped over defendant's road under a contract exempting defendant from loss by fire not due to its negligence, the burden is on defendant, in an action to recover the value of the cotton, to show that it was destroyed by fire, and that the fire was not due to the carrier's negligence. Galveston, etc., Ry. Co. *v.* Efron (Tex. Civ. App.), 38 S. W. 638.

**Perils of Navigation—Particular Cause of Loss.**—Where a loss is caused by the perils of the navigation within the exceptions of the bill of lading, it is not incumbent upon the carrier to show affirmatively the particular cause of the loss. Hill *v.* Sturgeon, 35 Mo. 212.

**Assumption of "All Damages That May Happen"—Negligence.**—Where the owner in employing a bailee to transport goods for him stipulates to take upon himself the risk of "all damages that may happen" to the goods in transportation, such condition will not exonerate the bailee from liability for damage to the goods resulting from his negligence or misconduct, but such stipulation will cast upon the owner the burden of proving that the damage was so occasioned. So held in Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228.

**Only Liable for Gross Negligence—Failure to Give Information in Regard to Fire.**—In Pennsylvania R. Co. *v.* Miller, 87 Pa. St. 395, it appeared that a carriage was shipped on defendant's railroad. The bill of lading provided that, except where defendant was guilty of gross negligence, it was not to be responsible for any of the dangers of railroad transportation or of fire. The carriage reached its destination much injured by fire, and defendant refused to give any information in regard thereto. It was held that by the refusal of defendant to give any account of the cause of the injury, a presumption of negligence arose which it was necessary for it to rebut; and that such presumption was not, ipso facto, repelled by evidence that defendant exercised ordinary care.

**Only Liable for Gross Negligence—Death of Horse.**—Where it was sought to recover for the loss of a horse shipped under a bill of lading specially relieving the carrier from loss in transit except through gross negligence, and it appeared that the horse died on the way, and there was no proof from plaintiff, or in the case, of the cause of the death of the horse, it was held that no presumption of negligence arose from the fact of the loss, and the plaintiff was not entitled to recover. Pennsylvania R. Co. *v.* Raiordon, 119 Pa. St. 577, 13 Atl. 324.

## III. MISCELLANEOUS.

**Combination of Common Carriers—Loss of Freight—Burden of Proving Sole Defendant's Possession.**—Where a number of common

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carriers combine under a name, for the purpose of carrying freight for hire along the route of all, an action for conversion may be maintained against them jointly or severally, and to maintain an action against one of them, it is not necessary to prove that the freight was lost while in its possession. So held in *Rice v. Indianapolis & St. L. R. Co.*, 3 Mo. App. 27.

**Failure of Express Company to Account for Freight—Fraud—Presumption.**—In the absence of evidence of any illegal conversion or fraudulent appropriation of property delivered to an express company for transportation and never delivered by it to the consignee or accounted for, fraud on the part of the express company cannot be presumed. So held in *Brehme v. Adams Express Co.*, 25 Md. 328.

**Goods Delivered—Payment of Freight—Presumption.**—Where goods have been delivered by a common carrier to a consignee, the presumption is that the latter has paid the carrier's charges. So held in *Shea v. Minneapolis, etc., R. Co.*, 63 Minn. 228, 65 N. W. 458.

**Presumption That Carrier's Employees Watered Stock.**—In an action against a railroad for injuries to stock in transit, it will be assumed, in the absence of evidence to the contrary, that the railroad's employees did their duty in watering the stock. So held in *Peterson v. Chicago, etc., Ry. Co. (S. Dak.)*, 102 N. W. 595, 18 R. R. R. 48, 41 Am. & Eng. R. Cas., N. S., 48.

**Proof of Delivery of Goods to Plaintiff—Presumption as to Their Identity.**—In *Barrow v. Philleo*, 14 Tex. 345, plaintiff proved bills of lading, dated in April, at Shreveport, La., for the transportation of goods for the plaintiff by the defendant to Rusk, in Cherokee County, Tex., and proved a delivery of certain goods by the defendant to the plaintiff at Rusk in May next thereafter, and that the same were damaged. It was held that, in the absence of evidence to the contrary, the presumption was that they were the goods covered by the bill of lading.

**Relation between Corporations—Presumption from Failure of Defendant to Introduce Evidence.**—In *Pennsylvania R. Co. v. Anoka Nat. Bank (C. C. A.)*, 108 Fed. Rep. 482, it is held that where plaintiff, in an action against railroad company, as a common carrier, to recover for loss of freight, introduces evidence which tends to show that defendant managed and controlled the line of railroad upon which the loss occurred, although it was owned by a separate corporation, such as that the managing officers of the two corporations were the same, that defendant held itself out to the public as operating the line by advertising it as part of its system, etc., and defendant fails to produce evidence to show the actual relation between the companies, it is a reasonable presumption that such evidence would support plaintiff's contention.

**Advertised Terms of Transportation—Shipper's Knowledge—Presumption.**—Where carriers have advertised favorable terms of transportation as a means of acquiring custom, the presumption is that their customers have been influenced by them, and it is not necessary, in a suit against them, for the plaintiff to prove that he knew of such terms before he delivered his property for transportation. So held in *McKeown v. Craig*, 20 Pa. St. 171.

A. R. Y.

ATCHISON, T. & S. F. Ry. Co. *et al.* v. ALLEN.

(Supreme Court of Kansas, Feb. 9, 1907.)

[88 Pac. Rep. 966.]

**Carriers—Transportation of Live Stock—Duties of Carrier.\***—It is incumbent upon a railway company carrying live stock to provide necessary and suitable yards and facilities for the care of stock shipped over its line, and in which stock in transit may be unloaded for rest, feed, and water.

**Same—Condition of Premises.†**—It is the duty of the railway company to keep such yards, with their approaches and walks, in a reasonably safe condition, not only for the stock placed in the yards, but also for persons who accompany the stock as caretakers, and who in the performance of their duties may find it necessary to go into or through the yards.

**Same.**—While the duty of feeding and watering the stock devolves upon the company, the caretakers accompanying the stock have a right to follow and inspect the stock and ascertain whether they are being given proper care, and the railway company is bound to exercise reasonable care for their safety while engaged in such business.

**Same.†**—The company is not only liable for injuries sustained by such caretaker by reason of defects in the walks in the yards of which it had actual knowledge, but also by reason of a patent defect which had existed so long that notice of it may be reasonably inferred.

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\*For the authorities in this series on the subject of the duties and liabilities of carriers of live stock, with respect to furnishing and maintaining stock pens, see *Reynolds v. Great Northern Ry. Co.* (Wash.), 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70 (duty of carrier to deliver stock to consignee in inclosed yards, convenient to place of unloading); *Lackland v. Chicago & A. Ry. Co.* (Mo.), 11 R. R. R. 414, 34 Am. & Eng. R. Cas., N. S., 414 (care required in furnishing pens); *Central Stock Yards Co. v. Louisville & N. R. Co.* (C. C. A.), 5 R. R. R. 259, 28 Am. & Eng. R. Cas., N. S., 259; *Houston & T. C. Ry. Co. v. Grammel* (Tex.), 3 R. R. R. 685, 26 Am. & Eng. R. Cas., N. S., 685; (liability where cattle were placed in insecure pen at night as affected by plaintiff's refusal to receive them and pay freight charges); *Missouri, K. & T. Ry. Co. v. Byrne* (Ind. Ter.), 13 Am. & Eng. R. Cas., N. S., 17 (action for loss of cattle through defective pens is ex delicto); *Missouri, Kan., etc., R. Co. v. Woods* (Tex.), 2 Am. & Eng. R. Cas., N. S., 519; *San Antonio & A. P. R. Co. v. Pratt* (Tex.), 2 Am. & Eng. R. Cas., N. S., 519 (duty to provide pens); *St. Louis, etc., Ry. Co. v. Law* (Ark.), 18 Am. & Eng. R. Cas., N. S., 286; note appended to *Missouri, etc., Ry. Co. v. Byrne* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 573 (liability with respect to cattle pens); *Texas, etc., Ry. Co. v. Bigham* (Tex.), 6 Am. & Eng. R. Cas., N. S., 791 (negligence with respect to cattle pens).

†For the authorities in this series on the subject of the degree of care due a person accompanying live stock, see foot-notes appended to *Chicago, etc., R. Co. v. Troyee* (Neb.), 19 R. R. R. 350, 42 Am. & Eng. R. Cas., N. S., 350.

*Atchison, etc., Ry. Co. v. Allen*

**Trial—Verdict—Special Finding.**—A general verdict for plaintiff, based on testimony that defendants in the exercise of reasonable diligence should have known of a defect which caused the injury, is not overthrown by a special finding to the effect that defendants had no actual knowledge of the defect.

(Syllabus by the Court.)

Error from District Court, Marion County; O. L. Moore, Judge.

Action by H. W. Allen against the Atchison, Topeka & Santa Fe Railway Company and others. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

*W. R. Smith, O. J. Wood, A. A. Scott, Lambert & Huggins* and *H. S. Martin*, for plaintiffs in error.

*W. H. Carpenter*, for defendant in error.

JOHNSTON, C. J. H. W. Allen shipped two car loads of cattle from Burns, Kan., to St. Joseph, Mo., over the Atchison, Topeka & Santa Fe Railway, and accompanied the cattle on the train as a caretaker. When the train reached Emporia, the cattle were unloaded and placed in the stockyards for rest, and to be fed and watered. The stockyards are adjacent to the railroad, and were then operated by Hatcher & Hatcher, under a contract with the railway company. The yards were inclosed and partitioned, with fencing about five feet high, and on the top of the fence around the pens in which the Allen cattle were placed two planks were laid on cross-pieces, which were fastened to the posts and secured by brackets. These planks so placed were used as a walk and also as a feed board. Shortly before the time fixed for reloading the cattle, Allen climbed upon the top of the fence and proceeded to walk around on the planks to inspect the cattle and learn if they had eaten the feed given them, and whether they needed more feed and water, and while so walking around one of the planks, which was resting on a decayed and defective support upon which he stepped, gave way, and he was thrown to the ground and severely injured. He brought this action against the railway company to recover damages, and afterward the Hatchers, who were in the management of the stockyards, were made defendants. The negligence charged against the defendants was in permitting the walk around the top of the pens to become and remain in a dangerous condition, in that an end of one of the cross-pieces supporting the walk was rotten and had broken off, leaving no support for the plank upon which Allen stepped and from which he fell. On the trial the jury awarded Allen damages in the sum of \$1,750.

It is contended that the evidence did not warrant the verdict. First, it is said that after Allen had turned the cattle over to the manager of the stockyards, and given orders to feed and water them, he had no further business in the yard until the cattle were reloaded; that he was not required to climb the fence, or use the walk from which he fell; that there were no steps leading from

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the ground to the top of the fence, or any invitation to use the planks as a walk; and that, if inspection of the cattle in the pens was necessary for any purpose, it could have been made by looking over the fence or through the cracks between the boards. There is testimony, however, that the planks placed on the top of the fence around the pens were designed and used as a walk, so that the owners and caretakers of cattle could inspect them, and from that position ascertain if they had been given sufficient feed and water, and that it would have been difficult to have seen whether there was feed and water in the boxes and troughs without a view from the top of the pen. It was incumbent upon the railway company to provide necessary and suitable yards and facilities for the care of stock intrusted to it for shipment, and in which stock in transit might be unloaded for rest, feed, and water. *Railway Co. v. Reynolds*, 8 Kan. 623. It was the duty of the company and those in charge of the stockyards to keep such yards in a reasonably safe condition, not only for the cattle inclosed in the yards, but also for the persons who accompanied the cattle, and who, in the exercise of their rights and duties as caretakers, might find it necessary to pass about and through the yards. The trial court rightly advised the jury that after Allen left the train, and went into the yards, he was not entitled to that high degree of care which is due to a passenger upon a train, but that the company was held to exercise ordinary care and prudence to see that persons who rightly visited the yards for any purpose were not injured. Caretakers who follow cattle which have been unloaded in the yards to be fed, watered, and rested are not to be regarded as mere volunteers or as trespassers. Although the yards are owned by the company, and its agents and managers are charged with the duty of feeding, watering, and caring for the cattle while in the yards, the accompanying owners or caretakers have a right to follow and inspect the cattle and see that they are receiving proper care. Allen was at least entitled to the protection and care due to a customer or patron of a business establishment. The protection which an owner or occupant of premises should take of customers coming upon the premises in the course of business, or of other persons who come by his invitation, express or implied, is discussed in the leading English case of *Indermaur v. Dames*, L. R. 1 C. P. 274, where it is said: "This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns himself; and if a customer were, after buying goods, to come back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to the protection during this accessory visit, although it might not be for the shopkeeper's benefit, as during the principal visit, which was; and if, instead of coming himself, the customer were to send his servant, the servant would be entitled to the same consideration as the

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master. The class to which the customer belongs includes persons who come, not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who come upon business which concerns the occupier and upon his invitation, express or implied."

In the case of *True v. Meredith Creamery*, 72 N. H. 154, 55 Atl. 893, it was held that a patron of a creamery who was waiting about a building in the ordinary course of the business is to be regarded as present at the invitation of the proprietor, who was bound to exercise ordinary care to protect him against the dangers of the place. The court approved the rule stated in 2 *Shearman & Redfield on Negligence*, § 704: "The occupant of land is bound to use ordinary care and diligence to keep the premises in the safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of business, or for any other purpose beneficial to him; or, if his premises are in any respect dangerous, he must give such visitors sufficient warning of the dangers to enable them by the use of ordinary care to avoid it. The extent, however, of his obligation, is to use ordinary care and prudence to keep his premises in such condition that visitors may not be unnecessarily or unreasonably exposed to danger." See, also, 21 A. & E. Encycl. of L. 471.

Allen had business in the yards to inspect and look after his cattle, and it was a business of common interest and mutual advantage to shipper and carrier. The plank walks on the fences were intended for the use of those inspecting and caring for stock placed in the yards. Allen was using the walk for that purpose when he was injured. It is said that another and safer method of inspection would have been to have looked through the fence, or, if that was impracticable, to have gone into the pens. It appears that a full view of the feed boxes and water troughs could not be had from the outside, and it can hardly be said that it would have been a safer or a better plan to have gone inside of the pens among the cattle, some of which were wild, and where the bottom of the pens were covered with filth. An inspection from the plank walk was a common practice and a convenient method, and would have been a safe one, if the walk, provided in part for the purpose, had been in good condition. The walk was adapted to and commonly used for that purpose, and Allen and other caretakers of stock had a right to assume that it was in a reasonably safe condition for such use. The company, having invited him to the yards as one of its patrons, and having provided walks for his use while inspecting and caring for his cattle assumed the obligation to keep the yards and walks in a reasonably safe condition for such use, and its failure in this respect will make it liable for the resulting injuries. *Texas & Pacific Railway Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388. The court correctly advised the jury that the defendants would only be liable for the injuries caused by a defective walk where they had notice of its defective condition, or where the defect was patent and had existed so long that notice of it might reasonably be inferred. The responsibility is as great where the de-



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fendants in the exercise of the diligence which the law requires should have known the defect as where they had actual knowledge of it.

The next contention is that answers of the jury to special questions were indefinite, unsupported by testimony, and fairly interpreted compelled a judgment for defendants. The questions were: "Did the defendant railway company know of the defect complained of before the accident in question? Ans. We do not know. Did defendant Hatcher know of the defect complained of before the accident in question? Ans. We do not know." These questions, together with a number of others, were submitted at the instance of the defendants. It is contended that under the testimony the jury should have given a definite as well as a negative answer to each question. Interpreting those given as the equivalent of negative answers, as we may, they do not overthrow the general verdict of the jury. They are no more than findings that the defendants had no actual knowledge of the defect in the walk. The questions were: Did they know of the defect? and not whether the defect was so patent and so long in existence that they should have known of it. There was testimony, too, that the break in the support of the walk was an old one, and one of which those charged with the duty of keeping it in a safe condition should have observed and remedied. Whether the defect was so open to observation that defendants are to be charged with notice of it has been settled by the jury, and, as there is testimony warranting an inference of notice, or a duty to know of the defect, that element, in the absence of a special finding to the contrary, is presumed to be included in the general verdict. As was said by Justice Cunningham in *Seeds v. Bridge Co.*, 68 Kan. 522, 75 Pac. 480: "All the elements which go to make up a plaintiff's right of recovery are found in his favor by a general verdict for him, and before special findings will avail to overthrow the general verdict they must have determined all those elements against his right of recovery." The broken parts of the cross-piece upon which the plank rested were presented to the jurors, and they had an opportunity to see the nature of the defect, and could determine about how long it had existed, and whether it was observable upon reasonable inspection by those in charge of the yards. Aside from this, there was the testimony that Hatcher, upon being informed of the fall and injury, remarked that he had been trying to get the Santa Fe to fix those planks for two or three years, and maybe they would do it now. We think the findings are not inconsistent with the general verdict, and that there is sufficient supporting testimony to uphold the verdict.

There is nothing substantial in the claim that in its instructions the court assumed the existence of disputed facts, nor in some objections made to the admissions of testimony.

Finding no prejudicial error in the record, the judgment will be affirmed. All the Justices concurring, except GRAVES, J., not sitting.

DI GIORGIO IMPORTING & STEAMSHIP CO. OF BALTIMORE CITY v.  
PENNSYLVANIA R. CO.

(Court of Appeals of Maryland, Dec. 21, 1906.)

[65 Atl. Rep. 425.]

**Evidence—Documentary Evidence—Private Writings—Authentication.**—A requisition on a carrier for cars for the transportation of goods cannot, without the requisite preliminary proof of its authenticity, be admitted in evidence.

**Same—Similar Facts—Failure to Supply Cars on Demand.\***—In an action for the negligent failure of a carrier to supply cars on demand, a requisition for cars for another time and for other goods is inadmissible.

**Carriers—Failure to Furnish Cars Requested—Action—Form—Contract or Tort.\***—A declaration, in an action against a carrier for failure to furnish cars, which alleged that plaintiff made requisition on the carrier for cars for transportation of the goods, and that the carrier received and accepted the requisition, and which charged that the loss claimed to have been sustained by plaintiff was due to the negligence of the carrier in failing to furnish the cars as requested, stated a cause of action in tort and not in contract, and a recovery must be predicated on the liability of the carrier as a common carrier to furnish cars.

**Exceptions, Bill of—Form and Arrangement—Reference to Other Bill.**—In an action against a carrier for failure to furnish cars the requisition for cars admitted in evidence was contained in the first bill of exceptions, complaining of the rulings on admission of evidence. There was no reference in the second bill of exceptions, complaining of a prayer given by the court, to the first bill of exception. Held, that the court, in passing on the correctness of the prayer, could consider the requisition for cars admitted in evidence and contained in the first bill of exception.

**Carriers—Obligation to Furnish Cars †**—A railroad engaged in the transportation of freight as a carrier is bound to furnish suitable cars to its customers on reasonable notice when it can do so with reasonable diligence without jeopardizing its other business.

**Same.**—A carrier held itself out as ready to carry perishable freight in such ventilated cars as the trade was accustomed to use. By usage it held itself out as ready to send cars on floats to a wharf and to receive perishable freight from ships on definite and reasonable notice of the time when such cars would be required and of the number needed. Held, that the carrier, on having reason to anticipate inability to furnish cars after receipt of notice therefor, must advise

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\*See extensive note, 19 R. R. R. 275, 42 Am. & Eng. R. Cas., N. S., 275.

†See foot-notes appended to *Eckert v. Pennsylvania R. Co.* (Pa.), 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475.

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the shipper in order to excuse itself from liability for failure to furnish cars.

**Same—Question for Jury.**—The rule that whether a carrier negligently failed to supply cars when demanded is for the jury applies only where a specific and definite notice of the time when the cars are required is shown.

**Same.**—In an action against a carrier for failure to furnish cars for perishable goods imported, it appeared that the carrier was as well posted about the movements of the ships carrying the perishable goods as plaintiff was; that a telegram of the arrival of vessels went to the chamber of commerce of the port, and the railroads made it their business to know every steamer that passed certain points before entering the port. Plaintiff was in a position to inform the carrier of the time when vessels were reported at such points and of the expected day and hour of their arrival. Held, that the carrier was under no obligation to keep some one on watch at the chamber of commerce for the purpose of ascertaining when vessels would arrive so as to be prepared to furnish cars for the transportation of cargoes.

**Same.†**—A carrier is not required to hold for a whole week a large number of cars for a single shipper without knowing on what day of the week or on what hour of the day a single car may be needed.

**Same.‡**—A requisition on a carrier to furnish cars for the transportation of perishable cargoes on the arrival of steamers required the carrier to furnish 8 cars for June 27th and to furnish other cars on further notice on the arrival of other vessels. On July 1st the carrier received notice to furnish cars. Twenty-one cars were supplied during that day and 10 were supplied next morning. The 21 cars furnished were too late for the fast freight because of the shipper's failure to give notice of the vessels coming in when he received it. Held, that the carrier was not liable for loss sustained by deterioration of the goods due to the delay in the transportation, there being no sufficient notice to furnish cars.

Appeal from Baltimore City Court; Dan'l Giraud Wright, Judge.

Action by the Di Giorgio Importing & Steamship Company of Baltimore City against the Pennsylvania Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

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†See foot-note appended to *State v. Chicago, etc., R. Co.* (Neb.), 13 R. R. R. 336, 36 Am. & Eng. R. Cas., N. S., 336; foot-notes appended to *United States v. Norfolk and Western Ry. Co.* (C. C. A.), 21 R. R. R. 207, 44 Am. & Eng. R. Cas., N. S., 207.

‡For the authorities in this series on the question, for what delays is a carrier of freight liable, see foot-notes appended to *General Fire Ext. Co. v. Carolina & N. W. Ry. Co.* (N. Car.), 19 R. R. R. 336, 42 Am. & Eng. R. Cas., N. S., 336; foot-note appended to *Mauldin v. Seaboard Air Line Ry.* (S. Car.), 19 R. R. R. 76, 42 Am. & Eng. R. Cas., N. S., 76; *Alabama Great So. R. Co. v. Quarles & Couturie* (Ala.), 19 R. R. R. 69, 42 Am. & Eng. R. Cas., N. S., 69.

## Di Giorgio Imp. &amp; S. S. Co. v. Pennsylvania R. Co

*George A. Finch* and *James A. Fechtig, Jr.*, for appellant.

*John I. Donaldson* and *Shirley Carter*, for appellee.

PEARCE, J. This is an action brought by the appellant, the Di Giorgio Importing & Steamship Company, a body corporate, against the appellee, the Pennsylvania Railroad Company, a body corporate, for failure to furnish cars for shipment of perishable goods over the lines of the appellee. The appellant was, in June, 1903, and still is, engaged in the business of importing into Baltimore tropical fruits, principally bananas, from Jamaica and Cuba. The declaration sets forth that the plaintiff being in possession on June 27, 1903, of one or more cargoes of bananas imported by it, and being desirous of shipping the same to its customers at various places in the United States, did, in accordance with the usual custom, make request upon the said defendant for cars for the shipment of said bananas, that the defendant received and accepted said request, and that the plaintiff, relying upon said acceptance, contracted to ship said bananas to its customers at various points, but that defendant failed to furnish said cars, whereby the plaintiff was unable to ship the said bananas, and was obliged to leave them a long time upon the steamers in which they were imported, and that a large part of the same in consequence decayed, and were lost to the plaintiff. The evidence showed that it had been for a number of years, and on June 27, 1903, still was, the invariable custom of these fruit steamers to dock and discharge their cargoes at Bowly's Wharf in Baltimore; that a portion of each cargo was sold from the ship's wharf side, but that the greater part was loaded from the other side of the steamship into specially constructed ventilated cars brought upon floats to the steamer's side by the appellee and by the Baltimore & Ohio Railroad, the cars of the former being then towed to Canton for shipment over the appellee's lines, and those of the latter to Locust Point for shipment over its lines. It is necessary for the preservation of this fruit, and its delivery in marketable condition at distant points, that the utmost expedition should be used in hot weather in transporting it from the steamship to the ventilating cars, and in transporting it, when loaded, to its destination. The steamships upon which it is imported are specially constructed for ventilation, and this method of construction, while the ships are in motion, is effective in retarding ripening and preventing decay, but when the steamers are moored these processes are very rapid if the fruit is not promptly transshipped. This is recognized as fully by the railroad carriers as by the importers, and, in consequence, special promptness is the rule of the railroad companies in furnishing cars for this purpose, as well as in establishing and operating fast freight trains. Henry Brown, in June, 1903, was superintending the loading of bananas on cars at Bowly's wharf for the Di Giorgio Importing & Steamship Company, and, in explaining how the necessary cars were obtained for shipment, testified that the steamship company furnished the Pennsylvania and the Baltimore & Ohio Railroads with requisitions each week for the number of cars which they

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would need for the following week, and that it was the custom to give those requisitions on Friday of one week for the succeeding week, and that some time in 1903 the Pennsylvania Railroad furnished a form of requisition, which the plaintiff filled out "giving the names of the steamers and the time when we wanted the cars, and stating the number of cars we wanted for the following week," and that these requisitions were sometimes sent through the mail and sometimes carried in person. There was then introduced in evidence the requisition made by the plaintiff on Friday, June 26, 1903, for the succeeding week, which is herein transcribed in full, as follows:

Requisition for Car Floats.

Baltimore, June 26th, 1903.

Mr. Wallace Malcolm,  
Pennsylvania Railroad Company.

No. ....
.. ...10 .....

Dear Sir:  
Floats are required at Bowly's Wharf as follows:

Day and Date Floats wanted	Time wanted	Name of Ship	Number of Floats
Saturday 6-27	10 a. m.	America	
		Bodo	
		S. Di Giorgio	Number of cars 90 to 100
		Syng	

Time sent out  
11:30 a. m. .... p. m.  
Shipper Di Giorgio Imp. & S. S. Co.,  
By H. Brown.

No. 10
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Baltimore, June 26, 1903.

Received from the Di Giorgio Imp. & S. S. Co. their requisition for car floats, numbered as above.  
Requisition received at ..... a. m. 2. .... p. m.  
Wallace Malcolm,  
Freight Solicitor.

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It was shown by this witness that the date of the requisition, the day and hour when the floats were wanted, the names of the ships to arrive, and the number of cars wanted, the time the requisition was sent out, and the signature, H. Brown, were all in his handwriting, and that the date of its receipt and the signature of the freight solicitor was in the handwriting of Wallace Malcolm, who then represented the defendant in that capacity. He further explained this requisition by saying: "Saturday, June 27th, what I mean by that, I give them the date on which I want the first float, and the other floats are to be subject to call when needed as to the arrival of the steamer. This requisition was to cover the entire ensuing week." The steamers Bodo and America arrived on June 29th and 30th, and for these sufficient cars were furnished in proper time. The steamer Di Giorgio arrived at Bowly's Wharf July 1st at 6 a. m. and the Snyg the same afternoon between 2 and 3 o'clock, and they were ready to unload the Di Giorgio within half an hour later. She had from 28,000 to 29,000 bunches, and it would require from 10 to 12 hours to unload a cargo of that size. Both these cargoes were in good condition, that of the Snyg being a little riper, and the thermometer at 3 p. m. that day stood at 93. They loaded promptly all the cars the defendant had furnished, but these were not enough, and the fruit that was delayed in unloading for want of cars rotted in part, and the rest ripened so rapidly they had to be sold at a loss. From 35 to 40 cars would have been required for the 29,000 bunches of the Di Giorgio, and about 20 cars for the 15,000 or 16,000 bunches of the Snyg, but some of these were to be shipped over the Baltimore & Ohio Railroad—about 15 car loads. The record shows that on the morning of July 1st defendant had nine cars at Bowly's Wharf which were loaded from the Di Giorgio, and that during that day and on the following morning the defendant furnished 31 cars, which were loaded from these two steamers. It also appeared that whenever one of these fruit steamers sailed from Jamaica or Cuba, plaintiff was informed by cable of the time of sailing, and amount of cargo, that the run is usually made in from four to six days, and that plaintiffs were also advised when their steamers passed Cape Henry, when they passed Cove Point coming up the bay, and when they arrived at quarantine. The record shows that the Di Giorgio and the Snyg were reported when they passed in the capes, but does not show that they were reported when passing Cove Point. Joseph Di Giorgio testified that the Di Giorgio arrived at quarantine about half past 3 o'clock in the morning of July 1st; that they made arrangements with the doctor at quarantine so that he can examine the papers and pass the ship without delay, so that they can commence working on the ship at midnight or any hour she arrives, but there is no evidence in the record that any notice was given by the plaintiff, or any one in his behalf, to the defendant, that either of these vessels had been reported at the capes or at quarantine. All that the record discloses is that about 10 o'clock on the morning of July 1st, after the arrival of the Di Giorgio, a demand was made for cars which were not furnished until late in the day and on the



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following morning, but this demand is not shown to have included cars for the Snyg. The earliest demand for cars for this vessel was made, so far as the record discloses, in Mr. Di Giorgio's letter written at 1:30 p. m. July 1st, in which he notifies defendant it will be held liable for damages, and also says "the Snyg will be due in about ten minutes, and we shall hold you alike responsible for this fruit." The plaintiff admitted on the following morning they had all the cars they needed, but said these were furnished too late to avoid the loss that they sustained. Joseph Di Giorgio said that the railroad company was as well posted about the movements of the ship as plaintiff was; that the telegram went to the Chamber of Commerce, and the railroads made it their business to know every steamer that passed Cape Henry and where it was consigned, because they are after business. He also testified that he saw Malcolm, the freight solicitor of defendant, about 11 a. m. July 1st, and that Malcolm then knew the Snyg was expected about 2 p. m. No notice was given by defendant of any inability to furnish the cars for the requisition of June 27th. We have condensed in the foregoing statement of facts the substance of all the evidence given in the case.

There are but two exceptions in the record, one to the exclusion of testimony, and one to the ruling upon the only prayer offered. After the requisition which has been mentioned was offered in evidence, the witness Brown was asked if he made any subsequent requisition about that time, and he said he supposed he did, as it was usual to send them every week, whereupon the following requisition, without identification or proof of any sort, was offered in evidence, and, upon defendant's objection, was excluded, and to this action the plaintiff took the first exception:

Requisition for Car Floats.

Baltimore, July 2nd, 1903.

Mr. Wallace Malcolm,  
• Pennsylvania Railroad Company.

No. .... ...11...
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Dear Sir:

Floats are required at Bowly's Wharf as follows:

Day and Date Floats wanted	Time wanted	Name of Ship	Number of Floats
Friday 7-3-03	3 p. m.	Avalon	Three
			Number of cars 24

Time sent out

..... a. m. 7. p. m.  
Shipper Di Giorgio Imp. S. S. Co.

By. H. Brown.

## Di Giorgio Imp. &amp; S. S. Co. v. Pennsylvania R. Co

No. 11

Baltimore, July 3rd, 1903.

Received from the Di Giorgio Imp. & S. S. Co. their requisition for car floats, numbered as above.

Requisition received at 9 a. m. . . . . p. m.

Wallace Malcolm,  
Freight Solicitor.

N. B. Just at present we have no cars on hand but hope to have some by the time your vessel arrives.

W. M.

This paper did not prove itself, and, without the requisite preliminary proof, could not properly have been admitted, but, apart from this consideration, we are unable to perceive how it could be regarded as relevant in an action founded upon negligence alleged to consist in the failure to supply cars on demand, upon another and distinct requisition of the week preceding, and for the cargoes of other steamers than that named in the requisition offered. There was no error in its exclusion. At the close of the plaintiff's case the defendant offered the following prayer: "That there is no legally sufficient proof of any binding contract by which the defendant was to furnish any special number of cars of the kind mentioned in evidence, and place them alongside of the steamers mentioned in this case at Bowly's Wharf, for the purpose of loading therein the bananas brought by said vessels, within any specified time. And inasmuch as there is no evidence that the defendant failed in any duty imposed on it by its calling as a common carrier, the plaintiff is not entitled to recover in this action, under the pleadings, and the verdict must be for the defendant." This prayer was granted, and to that ruling the second exception was taken. It will be observed that the declaration, though alleging that plaintiff made request upon defendant for cars for transportation of bananas, and that defendant received and accepted said request, yet proceeds to charge that the loss and damage claimed to have been sustained was due to the negligence of the defendant in failing to furnish the cars as requested, and that the plea thereto was the general issue plea in tort, "that it did not commit the wrongs alleged." Such a declaration in *P., W. & B. R. R. v. Constable*, 39 Md. 149, was held to be in tort and not in contract. The court quoted with approval from *Burnett v. Lynch*, 5 Barn. and Creswell, 589, that "where, from a given state of facts, the law raised a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action." The case of *Richardson v. Chicago & North Western R. R.*, 61 Wis. 597, 21 N. W. 49, is very sim-

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ilar to the case at bar. There the complaint alleged that the defendant, being a common carrier, was notified in advance of plaintiff's need of cars and was informed by the station agent that he should have the cars at the day named, but that they were not furnished "as agreed," whereby plaintiff suffered loss and damage. The court said: "Manifestly, there is no special contract here alleged in the complaint. True, it is alleged that the agent was notified, and that he informed the plaintiff that he should have the cars on the day named, but there are no sufficient allegations to constitute any mutual obligations or binding contract." And the same was held in *Missouri Pac. Ry. v. Texas Pac. Ry.* (C. C.) 31 Fed. 864. The court, in *Richardson v. C. & N. W. R. R.*, *supra*, then added: "Since the action was not based upon contract, the plaintiff must recover, if at all, by reason of defendant's liability as common carrier, upon notice to furnish cars, and a readiness to ship at the time notified." So here, if the plaintiff is to recover, it must be by reason of defendant's liability as a common carrier, and there was, therefore, no error in the ruling of the court so far as the first branch of this prayer is concerned.

- It is contended by the appellee that, inasmuch as the requisition admitted in evidence is contained only in the first bill of exception, and there is no reference in the second bill of exception to the first that cannot be considered by the court in passing upon the prayer, and there is no evidence of demand for any cars, but we do not think this contention can be sustained. This case in that respect is very similar to *B. & O. R. R. v. State, Use of Foyer*, 30 Md. 54, in which the court said the objection was more technical than substantial, and also said: "We cannot fail to perceive that the bill of exception for refusal to grant the defendant's prayers was second in the course of the trial, and that it was taken after all the evidence had closed, and the terms with which this second exception commences," whereupon, etc., sufficiently refer to what had preceded it to authorize resort to the first bill of exception to ascertain from the evidence whether the prayers refused were or not abstractions. Here the prayer is preceded by the following words: "The testimony upon the part of the plaintiff being closed, the defendant offered the following prayer." This manifestly refers to the testimony. See, also, *Ruhl & Sons v. Corner*, 63 Md. 190, and *Rowe v. B. & O. R. R. Co.*, 82 Md. 505, 33 Atl. 761, in illustration of the indisposition of the court to sustain so technical an objection.

Most of the propositions of law presented in the plaintiff's orderly and excellent brief are well supported by authority. Thus a railroad company engaged in the business of transporting freight as a common carrier is bound to furnish suitable cars to its customers upon reasonable notice whenever it can do so with reasonable diligence without jeopardizing its other business. 6 Cyc. 372; *Ayres v. Chicago & N. W. R. R.*, 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226; *Newport News R. R. v. Mercer & Warfield*, 96 Ky. 475, 29 S. W. 301, in which last case it is said: "It was

the duty of defendant as a common carrier, independent of statutory obligations to provide appliances, when requested for transportation of such goods as it held itself out as ready to carry." This was impliedly decided in *P. W. & B. R. R. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415, and expressly so held in the yet unreported case of *B. & O. R. R. v. Whitehill* (decided at this term) 64 Atl. 1033. The defendant here held itself out as ready to carry this class of perishable freight in such ventilating cars as the trade was accustomed to use, and, by long-established usage, it held itself out as ready to send such cars on floats to Bowly's Wharf and to receive such freight from the ship's side, upon definite and reasonable notice of the time when such cars would be required, and of the number needed, and, if he has reason to anticipate inability to do so, after receipt of such notice, he must advise the shipper in order to excuse himself. 6 Cyc. 444; *Helliwell v. Grand Trunk Ry. (C. C.)* 7 Fed. 68, 10 Biss. 170. Ordinarily, it is true, as contended by the appellant, that, in an action for damages for failure to supply cars, the negligence of defendant is for the jury to determine. *Helliwell v. Grand Trunk R. R. (C. C.)* 7 Fed. 68, 10 Biss. 179; *Ayres v. Chicago*, 71 Wis. 380, 37 N. W. 432, 5 Am. St. Rep. 226. So in *Lehman's Case*, 56 Md. 232 (40 Am. Rep. 415), where the court said: "Whether, upon the receipt of such notice as was given, the requisite means or equipment could have been provided by reasonable exertion was a question that should have been submitted to the jury for their determination upon all the proof in the cause." But these were all cases of definite specific notice of the time when the equipment was required, and this, it is apprehended, is the only principle upon which the rule can properly rest. In the case at bar the plaintiff was content to rest upon the requisition offered in evidence. Upon its face, it might be contended that all the floats and cars were required at 10 a. m. June 27, 1903, but Brown swore that the meaning was, under the established use of that form, that the first float carrying 8 cars was wanted June 27th, "and the other floats to be subject to call, when needed, as to the arrival of the steamer," and that this was to cover the entire ensuing week. It is admitted that all the cars required for the two steamers which arrived June 29th and 30th were received in due time. There is absolutely no evidence that any call was made for cars either for the Di Giorgio or the Snyg until 10 a. m. July 1st, as to the former, four hours after her actual arrival, and as to the Snyg, not until a few moments before her arrival. It is obvious that the reason for reporting to the plaintiff the time when these steamers passed in the capes, when they passed Cove Point, and when they arrived at quarantine, was that timely preparation might be made for unloading and reshipping the cargo, and to enable plaintiff, as part of this preparation, by means of the "call" which Brown said was contemplated by the requisition, to make certain and definite that which the requisition left vague and uncertain. It was in the power of the plaintiff to inform the defendant of the time when these vessels were reported at the points named, and of the ex-

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pected day and hour of their arrival, and, under the provision for the "call" above mentioned, it was their duty to do so. But there is no evidence that any call was made or any such notice given until 10 a. m. July 1st. There is no evidence that defendant had notice in fact from the Chamber of Commerce, or from any source, of the approach or expected arrivals of these vessels, and it cannot be held, under the circumstances of this case, to be their duty, to keep some one on watch at the Chamber of Commerce for that purpose. As was said in *Ayres v. Chicago*, 71 Wis. p. 380, 37 N. W. p. 436 (5 Am. St. Rep. 226), "the plaintiff had no reason to insist upon or expect compliance except upon giving reasonable notice of the time when they would be required. It must be remembered that the defendant has many lines of railroad scattered throughout several distant states, and many stations of more or less importance. \* \* \* No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along such different lines of railroad, loaded or unloaded." This defendant could not be expected to hold either at Bowly's Wharf, or at Canton, for a whole week, 100 cars for a single shipper, without knowing upon what day of the week or at what hour of the day a single car might be needed. This requisition was notice only as to the requirement of one float and eight cars for June 27th; as to all other floats and cars, a future notice was required, as "to arrival of steamers." It was held, reasonably, in *McGrew v. Missouri Pac. R. R.*, 109 Mo. 582, 19 S. W. 53, that, "where a railroad is not required by the order for cars to furnish them at any particular hour, the delivery at any hour of the day is sufficient." In the case before us the record shows that, of the 31 cars furnished on the notice given at 10 a. m. July 1st, 21 were supplied during that day, though too late for the fast freight at 1:30, and 10 were supplied next morning. That these 21 were too late for the fast freight was because of the plaintiff's failure to give notice of the vessels coming in when he received it. The requisition, as we have said, was not notice except as to the one float and eight cars for June 27th. As to all the others it required independent notice, and the question here is not one of reasonable notice, but of whether there was anything which could be regarded as notice to prepare for the arrival, and we do not think there is any evidence of any such notice as to the two steamers for the injury to whose cargoes this suit is brought. We have no disposition to relax any of the salutary rules of law which are so often required to be enforced in order to hold common carriers to their legal liability, but we can discover no evidence in this case of any failure in any duty imposed upon the defendant in its calling as a common carrier, and there was no error in our judgment in the ruling upon the latter branch of the prayer.

Judgment affirmed, with costs above and below.

STATE ex rel. COLUMBIA VALLEY R. CO. v. SUPERIOR COURT OF  
CLARKE COUNTY et al.

(Supreme Court of Washington, Jan. 15, 1907.)

[88 Pac. Rep. 332.]

**Corporations—Stock—Subscription by Trustee.**—A subscription to stock in a railroad company by a trustee of an undisclosed principal is a binding obligation on the trustee.

**Same—Evidence of Subscription.**—The books of a railway company are prima facie evidence of subscriptions to its stock, and are sufficient in condemnation proceedings instituted by it, where the fact that the stock was subscribed is not contested.

**Eminent Domain—Property Subject to Condemnation.\***—One railroad may condemn the lands of another, where there is a necessity for it and the land can be taken without material detriment to the owner.

Certiorari to Superior Court, Clarke County.

Condemnation proceedings by the Portland & Seattle Railway Company against the Columbia Valley Railroad Company and others. An order was entered for the assessment of damages, and the state, on the relation of the Columbia Valley Railroad Company, brings certiorari. Affirmed.

*Coovert & Stapleton*, for relator.

*James B. Kerr* and *Geo. T. Reid*, for respondents.

MOUNT, C. J. Certiorari to review an order of the superior court of Clarke county in condemnation proceedings. The Portland & Seattle Railway Company brought an action in the superior court of Clarke county to condemn certain described parcels of land, alleged to be necessary for the construction of its main line of railway down the north shore of the Columbia river. The Columbia Valley Railroad Company, the relator herein, and others, were made parties defendant. The relator filed an answer to the petition in condemnation, admitting that the said petitioner was a corporation duly organized under the laws of this state for the construction and operation, and has full power and authority to construct, maintain, and operate, railroads within this state, and that said petitioner has surveyed and located, and is now engaged in building, a line of railroad on the north bank of the Columbia river, from a point opposite Pasco to Vancouver, in this state, which railroad is being built as a common carrier of freight and passengers. The answer then denied that the lands described in

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\*See foot-notes appended to *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.* (W. Va.), 19 R. R. R. 412, 42 Am. & Eng. R. Cas., N. S., 412; foot-notes appended to *Atlanta, etc., R. Co. v. Atlanta, etc., R. Co.* (Ga.), 18 R. R. R. 680, 41 Am. & Eng. R. Cas., N. S., 680.



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the petition were necessary for the use of the petitioner, and as an affirmative defense the Columbia Valley Railroad Company alleged, in substance, that it was a corporation under the laws of this state, authorized to construct a line of railway down the north bank of the Columbia river; that it had located and adopted, and intends to build, a line of railway along said river from a point opposite Wallula to Ilwaco, in this state; that it has purchased considerable portions of its right of way, and is actually negotiating and endeavoring to acquire the whole thereof; that it is engaged in the construction of its road; that the land sought to be condemned by the Portland & Seattle Railway Company is land which was purchased by the Columbia Valley Railroad Company for its own right of way, and is necessary therefor; that the location of the line of the Columbia Valley Railroad Company was long prior to the location of the petitioner over said lands; that the line of the Portland & Seattle Railway Company conflicts and interferes with the line of the Columbia Valley Railroad Company a large portion of the distance across said premises, and that the said land is not located in a canyon, pass, or defile; and that it is not necessary for said petitioner to have or acquire a right to use or jointly enjoy with this defendant the said right of way purchased by this defendant for its own use over said premises. The petitioner, Portland & Seattle Railway Company, denied generally all the allegations of the answer. Upon these issues the cause was tried. The court found that the lands sought were for a public use and necessary for the construction of the Portland & Seattle Railway Company's line; that before the commencement of the proceedings to condemn the land the Columbia Valley Railway Company had made no attempt to use the lands for railroad purposes or other public use, and that the Columbia Valley Railroad Company had not acquired the land in good faith for railroad purposes, but was seeking to hinder and delay other railroad companies from building a line of railway down the north bank of the Columbia river. From these findings the court concluded that the Portland & Seattle Railway Company was entitled to appropriate the lands, but reserved for the period of one year to the Columbia Valley Railroad Company the right to construct a railroad across the premises on either side of the Portland & Seattle Railway, but not closer than 30 feet to the center line thereof. The jury was thereupon ordered to assess the damages. From this preliminary adjudication this writ was sued out.

It is first contended that there was no sufficient proof that all the stock of the Portland & Seattle Railway Company had been subscribed, and also because C. M. Levy subscribed, as trustee, that he was not personally liable, and, since his principal was not disclosed, no one was liable for the stock, and therefore the railway company was not authorized to institute condemnation proceedings. These questions were considered by us in *State ex rel. Biddle v. Superior Court*, 87 Pac. 40, where the rights of this same company were involved. We there held that the subscription of C. M. Levy, trustee, was a binding obligation upon him, and that

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the books of the company were *prima facie* evidence of the stock subscriptions. This decision was made while this case was pending here, and counsel for relator now very strongly urge that it is opposed to the great weight of authority upon these points, and that we should now overrule that case. It is true the rule has been severely criticised, but nevertheless we think it is a wholesome rule in cases of this character, where no hardship can result therefrom. It is admitted by the pleadings that the Portland & Seattle Railroad Company is duly organized, existing, and has full power to construct, maintain, and operate railroads within the state. The relator's property cannot be taken without payment is first made. These facts being conceded, and no attempt being made to show that the stock was not actually subscribed bona fide by parties responsible therefor, it seems that very slight proof of the fact of subscription in full of the capital stock ought to be sufficient. To hold that the books of the corporation are not competent to prove the original subscription of the stock in cases like this, where there is no issue upon the question, would require evidence from each of the subscribers, or from persons who are familiar with their handwriting, to the effect that the original stockholders actually subscribed for the stock. This would be impossible in old established corporations, or in corporations having a large number of widely separated original subscribers for stock, and in such cases should not be required. We are satisfied that the rule in the Biddle Case is a fair and sensible one, and therefore decline to overrule it.

It is contended that the premises in question are not subject to condemnation by the Portland & Seattle Railway Company, because such premises were acquired by the Columbia Valley Railroad Company for railway purposes. Conceding that the Columbia Valley Railroad Company acquired the premises in good faith for railroad purposes, and intends within a reasonable time to devote the lands to such use by constructing a railroad thereon, it has been held that one railroad company may appropriate the lands of another in this state, where there is necessity therefor and where the lands sought can be taken without material detriment to the established road. *State ex rel. v. Superior Court*, 40 Wash. 389, 82 Pac. 417; *Seattle & Montana R. R. Co. v. Bellingham Bay, etc., R. Co.*, 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907; *Seattle & Montana Railroad Co. v. State*, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. Rep. 866. The facts in this case show that both roads can readily accommodate themselves to the right of way in dispute, and that the Columbia Valley Railroad Company needs only to straighten its line, which the evidence shows can readily be done to its advantage when the road is built.

Upon a careful examination of the whole record we find no error, and the order of the lower court must therefore be affirmed.

CROW, HADLEY, FULLERTON, and RUDKIN, JJ., concur. DUNBAR and ROOT, JJ., not sitting.

STATE *ex rel.* LINCOLN TRACTION CO. *v.* FROST, District Judge.

(Supreme Court of Nebraska, Feb. 8, 1907.)

[110 N. W. Rep. 986.]

**Street Railroads—Use of Streets—Permit—Conflict with Franchise.**

—An ordinance of a city, which requires street railway companies and other corporations holding franchises to use the streets of the city to file an application for a permit before entering upon and obstructing the streets, and which requires the applicant to file specifications of the manner in which the work is to be constructed and to fix the location thereof, and requires it to give bond to hold the city harmless for damages caused by the proposed work, and which gives the city council power to grant or refuse such permit, is not invalid, as interfering with or violating the franchise rights of the company in the streets.

**Same.**—The court will not presume that under such an ordinance the city authorities will act arbitrarily or abuse their discretion, but will presume that the ordinance will be construed according to its legal effect, and that if the proper conditions are met the permit will not be refused.

(Syllabus by the Court.)

Application by the state, on the relation of the Lincoln Traction Company, against Lincoln Frost, as Judge of the district court. Writ denied.

*Clarke & Allen*, for relator.

*E. C. Strode*, for respondent.

LETTON, J. This is an original application for a writ of mandamus. The relator, a street railway company, which is the owner of a franchise to construct and operate a line of street railway on certain streets in the city of Lincoln, among which are N street and Twenty-First street, had commenced to build a line of railway upon N street, when an injunction was issued at the instance of the city of Lincoln, restraining it from further proceedings. A mandatory order was contained in the temporary injunction issued, commanding it to remove from the street the rails and ties already laid and put the street in the same condition in which it was found. This order was not final, but was merely interlocutory; and, since the relator was unable to appeal from the same, it began this action, praying for a writ of mandamus to require the respondent to vacate so much of the temporary order as requires it to take up and remove its tracks on Twenty-First street and on N street. The application for the writ alleges that the sole ground for the injunction was that the relator had not obtained from the city council a permit in conformity with a certain ordinance of the city, and further alleged that the ordinance in question is void, for various reasons set forth in the petition and

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which will be hereafter noticed. It was conceded upon the hearing that the question of whether or not the relator was entitled to a writ in this case depended upon the question whether the ordinance in question is void, or is a valid and proper exercise of the police powers of the city, in the matter of the regulation of the construction of street railways.

The ordinance in question is entitled: "An ordinance regulating the construction of new street railway tracks, gas mains or other constructions or works of whatever kind, in streets, public ways or grounds; to prohibit additional construction of street railway lines except by consent of the mayor and council; and to amend and repeal all ordinances in conflict herewith." The first section provides, in substance, that no street railway company, gas company, or owner of any system of public works, having or claiming a franchise within the city, shall construct any new lines of tracks, mains, or works, or the repair thereof, that requires obstruction of the use of the streets, except in accordance with the terms and conditions following. Section 2, so far as material here, is as follows: "Any street railway company, desiring to construct new tracks on streets not by them previously occupied, shall file with the city clerk a written application for permit to construct such track, stating location thereof, with complete specifications and plans of its proposed manner of construction and material to be used" (omitting the remainder of said section, which provides for the deposit of a certified check for and an estimate of the cost of paving on streets already paved). Section 3: "On filing such certified check, application and estimate of the city engineer, the matter shall come for consideration of the council, who shall cause publication of notice in two daily papers published in the city, for not less than one week, that the matter of such application will be considered by the council at a meeting, the time of which shall be therein stated, at which any persons interested may appear and show cause, if any there be, why such permit should not be granted. Such application shall then come before the council to be considered and may then be granted or refused as the mayor and council determine. If the permit is refused the certified check shall be returned to the company applying for such permit." Section 4 makes similar requirements as to gas companies or other companies having franchises for underground construction. Section 5 recites: "Every such applicant, street railway or other owner shall with their application file its undertaking to hold the city of Lincoln harmless of all claim for loss or damage that may at any time accrue to any person whomsoever or to any property by reason of such proposed work or for the manner of its execution and construction, and thereupon, except as hereinbefore provided, permit shall be granted to such company and it shall be authorized to proceed with such work." Section 6 provides penalties for a violation of the ordinance.

The relator contends that the ordinance is void because it empowers the city council to grant or refuse a permit to street rail-

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ways to construct tracks, and thereby enables the council to prohibit the exercise of the franchise and destroy the franchise itself, and that it is not a regulative ordinance, since it does not contain any terms or conditions whereby the exercise of the franchise is regulated. In support of this contention it shows that in the state of Nebraska street railway franchises are granted, not by the municipalities, but under the provisions of section 2, art. 11b, of the Constitution, which provides that no general law shall be passed by the Legislature granting the right to construct and operate a street railway within any city, town, or incorporated village without first requiring the consent of a majority of the electors thereof, and of sections 1 to 5, art. 7, c. 72, Comp. St. 1803. These sections require the organization of a corporation; that the termini of the proposed street railway must be fixed and the precise route described in its articles of incorporation, naming the streets through which the railway is to be constructed; the consent of a majority of the electors of the city to be given at a special election; the canvass of the vote by the council; and the recording in the office of the county clerk of a certificate of the city clerk of the result, showing the consent of a majority of the electors. Whereupon such company shall be authorized to construct and operate a street railway, "subject to such rules and regulations as may be established by ordinances of such city."

Construing these sections of the Constitution and the statutes, we have held that there is no authority given to a city to grant charters to street railways, and that the only authority given the city is to submit the proposition to the electors; for the consent of a majority of the electors is a condition precedent, on the happening of which depends the right to construct and maintain the railway. The grant by the Legislature under general law is ineffectual to give street railways the right to operate upon the streets of a city, unless such company has obtained consent of a majority of the electors. The Constitution and the statutes and the articles of incorporation constitute the charter of the company, and the consent of the electors, properly certified and recorded, gives it the license and authority to enter upon the streets, and the city can never add to nor take away any of its charter rights. *Lincoln Street Ry. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802. Since, therefore, the city of Lincoln has no power to grant or withhold a franchise to the corporation, and since the ordinance confers upon the city council the power to refuse the company permission to enter and construct its lines upon the streets upon which the consent of the electors has already been given it to operate, the relator argues that it is void, being in contravention of both the statutes of the state and the Constitution.

On the other hand, the respondent contends that, granting that the position of the relator is correct; and that the franchise of the company is derived from the general law and the articles of incorporation, and its right to use the streets in question has



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been given by the electors of the city and cannot be rescinded by the city, still its use of the streets must be and is subject to such reasonable regulations as the city authorities may prescribe and require for the protection of the public and for the orderly and proper use of the streets of the city, and that an ordinance which requires a street railway corporation which desires to construct new tracks upon streets not previously occupied by it, or to place additional tracks upon streets already occupied, to file with the county clerk a written application for a permit to construct such track, stating the location, and with complete specifications and plans of its proposed manner of construction and of the material to be used, is a reasonable exercise of the police powers of the city in the regulation of streets and highways; that it impairs no contract and violates no franchise. It is pointed out that the authorization to construct and operate such street railway is granted under the statute, "subject to such rules and regulations as may be established by ordinances of such city." The respondent admits that such rules and regulations must be reasonable in their operation, and must not be so harsh and arbitrary as to result in a violation of the franchise rights and privileges granted to the corporation, but insists that the ordinance in question is not of such a nature, but is a valid and proper exercise of the right of regulation.

It will be observed that the provisions of this ordinance are not confined to street railway companies alone, but apply to "gas mains or other constructions or works of whatever kind in streets, public ways, or grounds." It would seem that the object of this enactment is to procure and provide a permanent record of both surface and subsurface construction in the streets of the city, so that the exact location of street railway tracks and of gas mains, water-mains, and other underground construction may be preserved of record for the use and benefit of the city authorities. It needs no argument to show that such a record is not only useful, but well-nigh essential, for the proper control and regulation of the use of the street of a modern city. While the main purpose of the street is for passage by the general public and for the carrying on of traffic over its surface, still, in the present age, gas mains, water mains, conduits for the carrying of telephone, telegraph, and electric light wires, sewers, and pipe lines for other purposes are carried beneath the surface of the streets, and, unless an accurate record were kept by the city authorities of the depth and location of such lines, inextricable confusion and great damage might easily ensue. And so with the surface of the street. In a wide street the construction of a street railway with double tracks might be both reasonable and proper, while in a narrow street the construction and operation of more than one line of track might make the street practically useless for ordinary traffic. It is highly proper, therefore, that, before a street railway company enters upon the construction of its railroad in a street, it submit the location of its proposed line of road, together with the specifications and



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descriptions of materials proposed to be used, to the city authorities, to the end that it may be constructed with due and proper regard to the interests of the community in general, and with proper regard for public safety and convenience. In this discussion we have assumed that the purpose of the city in the passage of the ordinance is what it appears to be upon the face of the enactment. The court will not presume that the city authorities intend to act arbitrarily and without due and proper regard for the rights and franchise of the relator.

It is said that the terms of the ordinance permit the council to grant or refuse a permit, and that the whole matter of whether the relator may enter upon a street or not is left to the uncontrolled judgment of the city council; but this, we think, does not follow, and if it should ever happen that the city authorities acted, not in good faith, but arbitrarily and by an abuse of their discretion, and refused to permit the relator to construct and operate its line upon a street over which it was licensed to operate, the court would afford a remedy. The relator contends that the provision of the ordinance requiring notice to be given and a time fixed for all parties interested to show cause, if any there be, why a permit should not be granted, evidences that it was the intention of the council to construe the ordinance to mean that the city council may grant or refuse a permit at their will; but this is not a necessary deduction. The notice is designed to apprise the public generally, and persons living along the line of the proposed construction in particular, of the place and manner in which the railway is intended to be built. There may be circumstances, well known to the people living upon a street, why a railway should not be constructed upon a certain portion of the street or in a certain manner, which might not be clearly obvious to the members of the council; and the object of the notice and the time and place fixed for hearing is to give every person interested an opportunity to be heard upon all such matters, or others suggested by the plan proposed.

It is argued by the relator that other ordinances prescribe full regulations for the construction of street railways, and hence this one is useless and arbitrary; but the provision of this ordinance which requires specifications of the manner in which the line is proposed to be built is proper and necessary for the purpose of furnishing the city authorities with information as to whether it is the intention of the railway company to construct the line in accordance with the rules and regulations contained in such ordinances. As the respondent contends, the practice is similar to that of obtaining an ordinary building permit. The ordinances of the city prescribe the manner in which buildings shall be erected within certain limits, and require intending builders to apply for permission to erect buildings and to furnish such details of the proposed erection to the city engineer as will enable that officer to determine whether or not the proposed construction is permissible under the requirements prescribed by ordinance; and so here, since other ordinances exist prescribing the manner

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in which street railways shall be constructed, the detailed information required by this ordinance is necessary to allow the city authorities to determine whether the company proposes to comply with such restrictions. Further than this, the requirement that, before a permit shall be granted, an undertaking shall be given by every such applicant to hold the city of Lincoln harmless for all claims for loss or damage which may accrue to any person or to any property by reason of the proposed work or by the manner of its execution and construction, is a very proper and necessary condition, and one which the city authorities would be derelict in their duty if they did not require as a condition precedent to opening up and encumbering the streets. It is the duty of the city to use ordinary care to see that the streets are reasonably safe for public travel. If it permits individuals or corporations to dig holes and pile obstructions in the streets without exercising due care, it may be compelled to incur a liability to pay damages which in the ordinary use of the streets would not occur.

Under the conceded facts the relator has entered upon the construction of a street railway without making any attempt to test the temper of the city authorities upon the question of whether permission would be granted it. It has not tendered any bond to hold the city of Lincoln harmless from any damages that may accrue from the opening and encumbering of the streets. It has not described the location of its proposed railway or the manner in which it intends to build it. It seems to have assumed that the city council intended to violate its duty by arbitrarily refusing a permit. The matter seems so plain as not to require further discussion. We are of the opinion that the ordinance is a just and valid exercise of the police power of the city authorities for the care and regulation of the streets and for the protection of the public; that, properly construed and administered, it is neither harsh nor arbitrary in its operation. As the stipulation of the parties makes the decision of this case depend upon the invalidity of the ordinance, the relator is not entitled to a writ of mandamus.

The writ is therefore denied.

**ELDORADO, M. & S. W. RY. CO. v. EVERETT.**

(Supreme Court of Illinois, Feb. 21, 1907.)

[80 N. E. Rep. 281.]

**Witnesses—Examination—Basis of Opinion.**—In proceedings by a railway to condemn a right of way, it is competent to ask a witness, who has testified for the landowner and gives his opinion that the remainder of the tract would be greatly depreciated in value by the construction of the road, whether he knew of any farm which was depreciated in value by reason of a railroad going across it like the one in question, or any farm that sold or would sell for less on that account.

**Eminent Domain—Compensation—Property Not Taken—Danger of Fire.\***—In proceedings by a railway to condemn a right of way, the effect of a steam railroad running through the farm, with respect to the liability or probability that the crops would be set fire to, can be taken into account in estimating damages only to the extent that the danger of fire may affect the market value of the farm.

**Same.\***—In proceedings by a railway to condemn a right of way, damages that might be caused by the crops upon the land not taken being set fire to, and for which the railway company would be liable in another action, cannot be taken into consideration.

**Evidence—Value of Property—Admissibility.**—Where, in a proceeding by a railway to condemn a right of way, defendant claimed damages to the remainder of the tract not taken, it was competent for the railway to show that voluntary sales of tracts of land in the vicinity situated substantially the same as defendant's had recently been made, and the amount of such sales.

**Same—Similar Transactions—Value of Property.**—In proceedings by a railway to condemn a right of way, evidence as to what the railway company paid for a right of way across another tract of land, one-half a mile distant from defendant's, is incompetent.

**Trial—Instructions—Applicability to Issues—Matter Not within Issues.**—Where, in a proceeding to condemn a right of way, it appeared that there were no improvements on the land, it was error to charge that the fact of a part of the land being cut off from the improvements should be considered in estimating damages.

**Same.**—Where, in a proceeding to condemn a right of way, it appeared that there were no buildings on the land which would be subject to jar or other injury by moving trains, and no one lived on the premises who might be subject to inconvenience from smoke, noise,

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\*For the authorities in this series on the question whether danger to property not taken from fires set by locomotives may be an element of damages in condemnation proceedings, see foot-notes appended to *St. Louis, etc., Ry. Co. v. Oliver* (Okl.), 22 R. R. R. 167, 45 Am. & Eng. R. Cas., N. S., 167; *St. Louis, etc., R. Co. v. Continental Brick Co.* (Mo.), 21 R. R. R. 482, 44 Am. & Eng. R. Cas., N. S., 482.

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or other incidents of the operation of trains, it was error to charge that incidental injuries resulting from the perpetual use of the track for moving trains should be considered.

**Eminent Domain—Compensation—Special Benefits.**†—Benefits accruing to particular property by reason of the construction and operation of a railroad must be considered in determining whether the property has been damaged or not, notwithstanding other property in the vicinity is also increased in value by the construction and operation of the road, since property may be specially benefited by an improvement, though that benefit is shared by other property.

• Appeal from Williamson County Court; W. F. Slater, Judge.

Condemnation proceedings by the Eldorado, Marion & Southwestern Railway Company against J. F. Everett. From a judgment for defendant, petitioner appeals. Reversed and remanded.

*Colp & Ferrell*, for appellant.

*Denison & Spiller*, for appellee.

CARTWRIGHT, J. Appellant filed its petition in this case in the county court of Williamson county to cause to be assessed the compensation to be paid to appellee for the right of way over and upon a strip of land 100 feet wide, described in the petition, containing 4.46 acres, extending across a tract of land containing 46 acres. The defendant filed a cross-petition, claiming damages to the remainder of the tract in the use and cultivation of the same, and also upon the ground that the land was underlaid with a valuable bed of coal, and that the petitioner would take the coal underlying the right of way and prevent defendant from mining the same. The petitioner then filed a stipulation that the judgment entered should affect the surface only; that defendant should retain the full right and title to the coal and other minerals underlying the right of way, with full power and authority to mine and remove the same without let or hindrance, in the usual and customary manner of mining coal, without regard to the railroad to be constructed by petitioner; that the defendant should not, under any circumstances, be liable to petitioner for any damages that might result by reason of the mining and removal of the coal underlying the right of way, and that petitioner should build a crossing and fence the right of way within 30 days after its railroad should be in operation. The case was tried with a jury, and by their verdict they gave the defendant \$1800 for the land taken and \$630 for damages to land not taken. The court overruled petitioner's motion for a new trial, and rendered judgment on the verdict, from which petitioner appealed.

The petitioner introduced evidence as to the value of the strip

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†For the authorities in this series on the question, what do, and do not, constitute benefits to the landowner from the construction and operation of a railroad on or near his property, see foot-notes appended to *St. Louis, etc., R. Co. v. Continental Brick Co. (Mo.)*, 21 R. R. R. 482, 44 Am. & Eng. R. Cas., N. S., 482.

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to be taken, considering only the surface and the defendant retaining the coal and mining rights thereunder, and the defendant offered evidence on the same subject. There was very little difference in the opinions of the witnesses as to the value of the strip under those conditions, and their estimates ranged from \$30 to \$40 an acre. The controversy was over the issue raised by the cross-petition whether the remainder of the tract would be damaged. The land was underlaid with a valuable bed of coal about 6 feet thick, at a depth of 180 feet. The defendant resided some distance from the land, and did not occupy it; and it was farmed by a tenant. The defendant produced witnesses, who limited their testimony to the effect the railroad would have upon the surface as a farm in its use and cultivation, and testified that the property would be damaged to a considerable extent. The petitioner contended that the remainder of the land would be benefited, and would be worth more in the market by reason of railroad facilities. There was no railroad near enough to afford facilities for mining or transporting the coal, and the evidence for the petitioner tended to prove that the coal underlying the land was of trifling value without such facilities in immediate connection with it, and that the construction of the road would enhance the value of the portion of the tract not taken for right of way. Three witnesses, testifying for the defendant and giving opinions that the remainder of the tract would be greatly depreciated in value by the construction of the road, were each asked the question whether they knew of any farm which was depreciated in value by reason of a railroad going across it like this one, or any farm that sold or would sell for less on that account. The court sustained objections to the questions, and therein erred. *Chicago, B. & D. Ry. Co. v. Kelly*, 221 Ill. 498, 77 N. E. 916. It was proper that the jury should know the extent of the knowledge possessed by the witness upon the subject concerning which he gave his opinion, and the basis of such opinion, that they might judge of its value.

Another witness for the defendant was asked what the effect of a steam railway running through the farm would be with respect to the liability or probability that the crop would be set fire to. The court overruled petitioner's objection to the question, and witness answered that there would be such danger. Petitioner then asked the witness if he knew that the railroad company would be liable for the destruction of the crop if it set fire to it, and if he took that fact into account in his estimate, and the court sustained an objection to those questions. The court erred in the ruling, both for the reason that the question was not limited to the effect on the market value of the farm arising from danger of fire, and because it included damages for which the petitioner would be legally liable in another action. It is not proper to take into account damages which do not affect the market value of the property, nor damages or injuries for which the petitioner would be liable in another action. *Jones v. Chicago & I. R. Co.*, 68 Ill. 380. There were no buildings on the

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land, and no improvement whatever, except a well, which would not be damaged by a fire.

The defendant having introduced evidence in support of the cross-petition, the petitioner, in connection with other evidence offered in rebuttal, proved that various tracts of land in the vicinity were situated substantially the same as this tract and were similar in character, and then asked a witness whether he knew that certain of those tracts had been sold within the last year, and whether the sales were voluntary. The question was objected to as not proper in rebuttal, and the court sustained the objection. The petitioner then offered to prove by witnesses present in court that voluntary sales of said tracts had recently been made, including the underlying coal, or of the coal as separated from the surface, and the amount of such sales. The court refused to receive the evidence, on the ground that it was not proper rebuttal. The evidence was competent and material (*Peoria Gaslight Co. v. Peoria Terminal Ry. Co.*, 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373), and the court erred in sustaining the objection. The petitioner, in the first instance, was only called upon to prove, and only did prove, the value of the 100-foot strip with the coal and mining rights reserved to the defendant. The defendant then offered proof in support of the cross-petition, and the petitioner then had the right to show what the coal underlying the land, or the remainder of the tract including the coal, was worth in the market when the petition was filed. So far as anything relating to damages to the remainder of the tract was brought into the case in the first instance, it was done by cross-examination, and petitioner was not precluded from meeting the evidence in support of the cross-petition.

A witness for the defendant was permitted, against the objection of petitioner, to state what petitioner had paid for a right of way across another tract of land one-half mile east of this tract. The petitioner afterward moved the court to exclude the evidence, and the court did so. The evidence was incompetent. *Schuster v. Sanitary Dist. of Chicago*, 177 Ill. 626, 52 N. E. 855. The fact was brought before the jury and had accomplished its purpose, so that it is doubtful whether the subsequent exclusion of the evidence cured the error. Whether that error would be ground for reversal it is not necessary to decide.

Complaint is made that the court refused to give three instructions asked by the petitioner, which stated in somewhat varying language that, if the fair cash market value of the land not taken would be as great after the taking as before, or greater, such land would not be damaged. The principle stated was correct, but the court was right in refusing the instructions, for the reason that the same principle was stated to the jury repeatedly in other instructions. More instructions were given at the request of each party than were required. There was practically no dispute as to the value of the strip of land actually taken, and as to the remainder the question to be determined was whether or not it would be worth less in the market with the railroad than with-



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out it. A few simple instructions would have covered that subject; but the instructions for the defendant included almost everything that could be thought of that could affect any tract of land, whether applicable to this land or not. We would not feel justified in taking up the numerous instructions separately, and pointing out their defects. The jury were instructed to consider the fact of a part of the land being cut off from the improvements when there were none and to consider incidental injuries resulting from the perpetual use of the track for moving trains. There were no buildings on the land which would be subject to jar or other injury by moving trains, and no one lived on the premises who might be subject to inconvenience from smoke, noise, or any other incidents of the operation of trains; so that there was nothing to justify an assumption that there would be any incidental injury affecting the market value from the cause stated. The jury were told, in different instructions, that no benefits or advantages accruing to the lands or property in common with all other property along the line of the railroad by reason of the construction and operation of the railroad could be taken into account, and that special benefits are such benefits flowing from the proposed construction and operation of the railroad as do not apply to other lands, generally, in the neighborhood.

The real question submitted to the jury, as repeatedly stated in the decisions of this court, was the value of the land not taken, at the time of filing the petition, with and without the improvement; and the fact that other property in the vicinity is increased in value by the construction and operation of the road furnishes no excuse for excluding special benefits to the particular property in determining whether it has been damaged or not. *Metropolitan West Side Elevated Ry. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773. The lands generally along the line in this vicinity were coal lands, and might all be benefited by reason of improved facilities for mining and transporting coal. Considering benefits which enhance the value of the particular property is not setting off benefits against damages, but is simply ascertaining whether there are damages or not. If the property is of the same value after as before the improvement, the owner has sustained no loss. Damages cannot exist if the value of the property is not lessened, and the benefit which the landowner secures as an owner of the property is a special benefit. In determining whether land has or has not been damaged the jury should consider whether the market value of the property remaining will be enhanced by the improvement, although other property in the vicinity will be likewise benefited. *Metropolitan West Side Elevated Ry. Co. v. White*, 166 Ill. 375, 46 N. E. 978. It is true that general benefits affecting the whole community, whether owners of property along the line of a railroad or not, such as increased facilities for travel, the increase of population, and enhancing the general prosperity, are not to be taken into account; but benefits flowing from the proposed improvement which appreciably enhance the market value of the particular

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tract of land and offset injuries to it are to be considered, for the purpose of determining the ultimate question whether there are damages to the lands not taken.

The instructions were erroneous in the particulars which have been pointed out. The judgment is reversed, and the cause remanded.

Reversed and remanded.

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**NEW JERSEY, I. & I. R. Co. v. TUTT, et al.**

(Supreme Court of Indiana, Feb. 26, 1907.)

[80 N. E. Rep. 420.]

**Eminent Domain—Railroads—Condemnation of Right of Way—Damages.**—Where lands are condemned by a railroad for a right of way, all damages for rights taken and resulting to the remaining lands, both present and prospective, which are the natural and reasonable incidents of the proposed improvement, must relate to the time of filing the condemnation complaint.

**Waters and Water Courses—Surface Water—Drainage Ditch—Obstruction—Railroad Embankment.**—Under Burns' Ann. St. 1901, § 5153, authorizing railroads to construct roads across any stream of water, water course, etc., a drainage ditch fed by no spring or water course, and used and constructed solely for expediting surface drainage, is not a water course, which the railroad is obliged to preserve and restore to its former state.

**Same—Rights of Railroad.\***—Railroad companies have the same rights as individuals to throw barriers against the flowage of surface water onto or across their right of way.

**Eminent Domain—Obstruction of Drain—Assessment of Damages.**—Where a railroad was authorized to destroy a drain by constructing its embankment across the same, it was proper for the appraisers in condemnation proceedings to assume that the road would exercise its legal rights in that respect, and to consider the obstruction of the drain and the consequences to the land whereon the same was situated, as a proper element of damage.

**Same—Act of Condemnation—Construction.**—Where an act of condemnation for a railroad right of way included the right of the railroad to take materials for the construction and repair of the road and the right of way over the land sufficient to enable it to repair and construct the road, and the right to convey water by drains and to make proper drains, such rights were for the benefit of the railroad, and did not require it to restore a ditch for the drainage of

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\*See foot-notes appended to *Earhart v. Cowles* (Iowa), 12 R. R. R. 243, 35 Am. & Eng. R. Cas., N. S., 243; *San Antonio, etc., Ry. Co. v. Kiersey* (Tex.), 16 R. R. R. 10, 39 Am. & Eng. R. Cas., N. S., 10; *Uhl v. Ohio River R. Co.* (W. Va.), 15 R. R. R. 608, 38 Am. & Eng. R. Cas., N. S., 608.

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surface water across its right of way destroyed by the construction of its embankment.

**Same—Evidence.**—Where, under right of way condemnation proceedings, a railroad had constructed its embankment across defendant's drainage ditch, placing a tile drain under the embankment, a witness was properly permitted to state, for the purpose of showing damages, that at the time of the trial the water was backed up from time to time.

**Same.**—Where, at the time of the trial of railroad right of way condemnation proceedings, the road had already constructed an embankment across a drainage ditch on defendant's land, evidence as to the manner of placing a drainage tile through the embankment, and the extent to which the water was thereby set back over the contiguous lands, was admissible for the purpose of showing the actual damages to the land; it being assumed that the road was constructed as contemplated at the time the right of way was appropriated, and that the present apparent damage would have been reasonably anticipated if assessed before construction.

**Evidence—Opinion Evidence.**—In railroad right of way condemnation proceedings, an expert witness was properly permitted to state whether a certain sized tile, if set at the bottom of a drainage ditch over which the railroad embankment was constructed, would suffice to pass the volume of water that the ditch would carry down to the embankment.

**Same—Character of Soil—Crops.**—In railroad right of way condemnation proceedings, witnesses were properly permitted, as a basis of opinions expressed as to the value of the land before and after the taking, to describe the character of the soil, and to name the various crops to which it was adapted.

**Eminent Domain—Elements of Damage.†**—In railroad right of way condemnation proceedings, the cutting of fields into inconvenient shapes, the interruption of convenient ways for animals to pass from the farm buildings to and from pasture, and the necessity for additional fencing are elements of damage properly inquired into.

**Same—Increased Hazard from Fire.‡**—The increased hazard from fire being set from passing locomotives is also a proper consideration for the jury in estimating the damages.

**Trial—Instructions.**—The refusal of a requested instruction, substantially given by the court in other instructions, is not error.

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

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†For the authorities in this series on the subject of the damages recoverable in proceedings to condemn land for a railroad right of way, see foot-notes appended to *St. Louis, etc., Ry. Co. v. Oliver* (Okl.), 22 R. R. R. 167, 45 Am. & Eng. R. Cas., N. S., 167; *Shirley v. Southern Ry. Co.* (Ky.), 21 R. R. R. 787, 44 Am. & Eng. R. Cas., N. S., 787; foot-notes appended to *Chicago, etc., Ry. Co. v. Kelly* (Ill.), 21 R. R. R. 340, 44 Am. & Eng. R. Cas., N. S., 340; *Moudy Mfg. Co. v. Pennsylvania R. Co.* (Pa.), 21 R. R. R. 318, 44 Am. & Eng. R. Cas., N. S., 318.

‡See preceding case, and foot-notes.

*New Jersey, etc., R. Co. v. Tutt*

Action by the New Jersey, Indiana & Illinois Railroad Company against Joseph D. Tutt and others. From the judgment, plaintiff appeals. Transferred from Appellate Court, under Act 1901, p. 590, c. 259. Affirmed.

*Bricks & Bates* and *Meyer & Drummond*, for appellant.  
*Anderson, Du Shane & Crabill*, for appellees.

HADLEY, J. This was a proceeding by appellant to condemn a right of way for a steam railroad over the lands of appellees. Appellant filed an instrument of appropriation in the clerk's office of St. Joseph county, on June 18, 1904. On July 9, 1904, appraisers were duly appointed to assess the damages, who estimated the same at \$491, and filed their award with the clerk July 27, 1904. August 3, 1904, appellees filed their exceptions to the award. Upon these exceptions the proceedings were transferred to the St. Joseph circuit court. The question of damages raised by the exceptions was submitted to the jury October 17, 1904, which body returned a verdict for \$1,750. Over appellant's motion for a new trial, the court rendered judgment upon the verdict, from which this appeal was taken.

The record shows that the appellees are the owners of four 40-acre tracts of land, three 40's lying north and south, and the fourth lying immediately west of the north 40; thus giving the whole tract an "L" form. Appellant's railroad traverses the west and north 40 near the center, in a somewhat northeasterly and southwesterly direction. The Kankakee river lies a short distance to the northwest, and most of the appellees' and a large amount of other, lands adjacent on the north, east, and southeast form a part of the headwaters of said river. A short time before the commencement of these proceedings Mr. Studebaker, the owner of the lands abutting on the Kankakee river, dredged a large ditch eastwardly through his land to the lands of Mr. Kaufman. The latter, in turn, beginning at the end of the Studebaker ditch, cut a drain, 6 feet at the top, 5 feet deep, and 2½ feet at the bottom, eastwardly, through his land, to the southwest corner of appellees' north and west 40; thence appellees continued it, at same size and depth, eastwardly, along the entire, side line of the last-named 40 acres, and thence southeasterly, across their other lands, to the lands of Mr. Burroughs on the east, at which latter place it received, for conveyance to the Kankakee river, a large body of water collected and brought down, from the east and southeast, through a swale. The waters that flowed through the ditch came wholly from heavy rains, or melting snows, in the spring and fall, and before the construction of the ditch there was no channel of any kind across appellees' land, and in times of heavy rains the waters would spread out over the marsh, and the grounds of the plaintiff, and slowly make their way to the Kankakee river. At the point where the railroad embankment crossed the ditch described appellant put in a 24-inch tile, claimed by some of the witnesses to have been set 18 inches higher than the

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bottom of the ditch on the upper side. At the time of the trial the railroad was so far completed that the ties were being laid through appellees' land.

During the trial a witness was asked the following question: "Q. Did you notice whether the tile was put in on a level with the bottom of the ditch. Ans. I should think it was about 18 inches from the bottom of the ditch. The water is backed up from time to time. It was when I was there." Appellant moved to strike out the following words of the answer: "The water is backed up from time to time. It was when I was there"—upon the ground that overflow caused by backing water was not a proper element of damage in a condemnation proceeding, because a recovery here would not bar a future recovery in another action for future injury caused thereby; and for the further ground that the damages should relate to the time of the filing of the instrument of appropriation, and that the damage for improper drainage cannot be recovered in this action because such damage grows out of negligence in construction. The real basis of many objections to the introduction of testimony is rooted in the fact that the trial of the exceptions to the award was so long delayed in the circuit court that the railroad was constructed and the witnesses afforded an opportunity to observe the actual—not imaginary—effects the construction had upon the value of appellees' land. In the course of the inquiry observation by the witnesses was often referred to, and really took the place opinion would have held if the trial had occurred before the building of the railroad, but throughout the trial, while considerable latitude was allowed appellees in referring to present conditions, all evidence relating to drainage was clearly limited to the act of appropriation, and as computable of that date. It has been uniformly held in this state that all damage for rights taken, and resulting to the remaining lands, in condemnation proceedings, both present and prospective, which are the natural and reasonable incidents of the proposed improvement, assuming that it will be properly and legally constructed in accordance with the instruments of appropriation, must relate to the time of filing the condemnation complaint. The rule is that there can be no fresh damage without a fresh injury. *Railway Company v. Hunter*, 128 Ind. 213, 27 N. E. 477; *White v. Railroad Co.*, 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; *Sherlock v. Railroad Co.*, 115 Ind. 22, 17 N. E. 171; *Railway Co. v. Allen*, 113 Ind. 308, 15 N. E. 451, 3 Am. St. Rep. 650. With respect to the regularity in allowing present conditions to be referred to, in estimating the damage, we shall have occasion to consider hereafter.

The principal contention between the parties is this: Appellant maintains that the destruction or impairment of the drain above described, as alleged, by building the railroad embankment across it, was the result of improper construction, and afforded appellees a new and additional cause of action for damage that was not assessable in the first instance; while, on the other hand, appellees contend that the drain being an artificial channel pre-

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pared for the collection and conveyance of surface water, the railroad company, by its act of condemnation, acquired the right to obstruct it, and to prevent the water that flowed therein from crossing its right of way, and that in assessing the damage resulting to the farm, once for all, it was reasonable to anticipate that the company, in the exercise of its legal rights, would obstruct the ditch, and therefore the prospective loss of drainage was a proper element of damage to be considered in making up the award.

This leads to the inquiry whether the ditch was such "a stream of water," or "water course," as the company was required to preserve and "restore to its former state." The legal distinction between a "stream of water," and a "water course," if any, is shadowy and unsubstantial; and for our purpose here it is enough to say that, if the drain above described was not a water course, it was surely not a stream of water. Was it a "water course" within the meaning of the law? In a legal sense a "water course" is a channel cut through the turf by the erosion of running water, and well-defined banks and bottom, and through which water flows, and has flowed immemorially, not necessarily all the time, but ordinarily, and permanently for substantial periods of each year. *Weis v. City of Madison*, 75 Ind. 241, 253, 39 Am. Rep. 135; *Rice v. City of Evansville*, 108 Ind. 7, 9 N. E. 139, 58 Am. Rep. 22; *Board v. Wagner*, 138 Ind. 609, 38 N. E. 171; *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230; *Railroad Company v. Speelman*, 12 Ind. App. 372, 380, 40 N. E. 541; *Maxwell v. Shirts*, 27 Ind. App. 529, 61 N. E. 754, 87 Am. St. Rep. 268. "For a water course," says Justice Brewer, in *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241, "there must be a channel, and a bed to the stream, not merely lowland, or a depression in the prairie over which the water flows. It matters not what the width or depth may be, a water course implies a distinct channel; a way cut and kept open by running water." In *Case v. Hoffman*, 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, 44 L. R. A. 728, it was held that mere surface or percolating water does not become a water course by being gathered into a ditch and conveyed away, and that such surface currents as do not follow a designated and known channel are not governed by the rules relating to water courses. The same court further held that the same line of discharge of water, in times of heavy rains and melting snows, from a period created by the natural assembling of surface water, did not constitute a water course, either when occupying the surface or when artificially lowered. *Fryer v. Warne*, 29 Wis. 511, 515. Beyond question it is the law of this state that an artificial channel, constructed solely for expediting surface drainage, and which is employed but occasionally and temporarily in collecting and carrying away storm and surface water, such waters only as proceed from heavy rains or melting snows is not a water course within the meaning of section 5153, Burns' Ann. St. 1901.

There is no reasonable dispute but that the ditch in contro-



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versy was one of this class. It was fed by no spring or water course. It contained and carried water only in the wet seasons of the fall and spring, and drew no part of its supply from any body of water, except that which flowed into it from the swale that conveyed surface water down through the farm of Mr. Burroughs in wet periods. Under the unchallenged evidence the ditch in controversy was simply a surface water drain. Being such, it falls within the doctrine that surface water is a common enemy which every proprietor may fight and get rid of as best he may. "The owner of property," says Judge Dillon (Mun. Corp. § 798), "may take such measures as he deems expedient to keep surface water off from him, or turn it away from his premises." To same effect, see *Railroad Company v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114. Railroad companies have the same rights as individuals to throw barriers against the flowage of surface water onto or across their right of way. *Clay v. Railroad Company*, 164 Ind. 439, 444, 73 N. E. 904, and cases cited. It follows that appellant had the lawful right to destroy the drain by constructing its embankment across it; and in assessing appellee's damage it was proper for the appraisers to assume that appellant would exercise its legal rights in this respect, and they were thus warranted in considering the obstruction of the ditch, and the consequences to appellees' farm, as a proper element of damage.

The argument that the act of appropriation imposed upon appellant the duty of restoring the ditch across its right of way, and that the failure to do it properly was negligence for which another action would lie, is unsound. The act of condemnation provided, among other things, that it "included the right of said company to take materials (except timber) for the construction and repair of such road, and the right of way over said land sufficient to enable said company to repair and construct said road and the right to conduct water by drains, and the right to make proper drains." These rights, so appropriated, were for the benefit of the appropriating company. The right to construct drains was intended to conserve appellant's interests in draining its right of way; not the purpose of enabling appellant to drain lands for the benefit of adjoining proprietors. The ditch was a valuable attribute or part of appellees' farm; and, like a dwelling, a barn, an orchard, or other improvement of value to the farm generally, or of special value to a part of it, was subject to condemnation by appellant for the construction of its railroad, upon payment of the damage that the farm, as a whole, would sustain. It was therefore clearly proper for appellees to inquire into every item, or element, of damage to their farm that accrued as a natural and reasonable result of constructing the railroad embankment over the drain in controversy, both present and prospective. So we hold that the motion to strike out that part of the answer, to wit, "The water is backed up from time to time. It was when I was there"—was properly overruled.

The fifth clause of complaint is that the court permitted a wit-

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ness, over objection, to answer the following question: "Q. State the level of the bottom of the tile as compared to the bottom of the ditch on the east side. Ans. Well, I should think about 18 inches above." The ground of objection was that the question called for condition created since the filing of the articles of appropriation, and the improper placing of the tile was a matter of negligence for which a separate, and subsequent, action for damage would lie. In this class of cases recoverable damages are the actual damages sustained by the taking, and to the remaining premises, present and prospective, to be arrived at in the most practicable, reliable way, and we know of no better way, when possible, of ascertaining such damages, than by observing the actual effects upon the premises after the construction of the railroad is accomplished. In such cases it will be assumed that the road has been constructed as contemplated at the time the right of way was appropriated, and that the present, apparent damage, would have been reasonably anticipated if assessed before construction. *Railroad Company v. Kuhn*, 38 Kan. 104, 108, 16 Pac. 75. A distinguished author states the proposition thus: "It is apparent that, when a part of a tract is taken, the damage to the remainder can never be satisfactorily estimated without knowing how the works on the part taken are to be constructed. \* \* \* If the works have actually been constructed before the damages are assessed, it has been held proper to take into consideration the actual condition of the works as affecting the damages." 2 Lewis' Em. Dom. (2d Ed.) § 481, citing *Union, etc., Railroad Company v. Moore*, 80 Ind. 458, and many other cases.

The insistence that the inquiry into the manner of placing the tile through the embankment, and to the extent to which the water was thereby set back over the contiguous lands, should have been denied, because it exposed appellant to being mulcted in damage; for an act that would not bar a subsequent recovery for negligence, cannot be allowed. Appellant having condemned the right to obstruct the ditch, and being under no legal duty to restore it to its former estate, an unsuccessful effort to do so of itself will not impose a liability for negligence. Neither will such effort, if voluntarily taken, furnish appellant with any valid basis to claim a reduction of the damage for the obstruction of the ditch. It is, however, manifest from the record that appellant did receive a very substantial benefit for its effort to make a conduit for the water through its embankment. In answer to an interrogatory the jury returned that, without any provision being made for the escape of the surface water from one side of the railroad to the other, the damage to appellees' land would be \$3,000, and found by their verdict that the total damages to the farm, including the land taken, was \$1,750. The trial seems to have proceeded on the assumption that the railroad was, in all respects, constructed as contemplated by appellant in its act of appropriation, and what appears to have been the real controversy, on this point, was whether the tile, in size and in

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the position given it, was adequate to facilitate the escape of the water so as to prevent its being set back over the fields. The fact is that if all the evidence concerning the tile, which appellant claims was erroneously admitted, had been excluded, and the case given to the jury, with the right for them to anticipate that in the construction of the railroad no provision would be made for the escape of the water across the railroad, appellant might have had greater reason for complaining of the verdict.

A witness was asked to state whether a 24-inch tile, if set at the bottom of the ditch, would be sufficient to pass the volume of water that the ditch would carry down to the railroad embankment, and he answered: "No, sir; I don't think it would. I don't think anything short of a culvert, or four-foot opening would take the water through." Appellant moved to strike out the answer because it was the statement of the witness' opinion on a matter of fact that belonged to the jury, and not to a witness. The motion was overruled. Assuming that the testimony was material, we think the evidence was competent. It is the law of this state that a witness will not be allowed to express an opinion upon a subject of which the jury is as well prepared to judge as the witness; or, as generally expressed, he will not be permitted to give his opinion upon the exact question the jury are to decide. *Bonebrake v. Board*, 141 Ind. 62, 64, 40 N. E. 141; *Railroad Company v. Donnegan*, 111 Ind. 179, 191, 12 N. E. 153; *Coal Company v. Buffey*, 28 Ind. App. 108, 115, 62 N. E. 279; *Turnpike Company v. Andrews*, 102 Ind. 138, 142, 1 N. E. 364, 52 Am. Rep. 653; *Lawson, Ex. & Op. Ev.*, pp. 507, 509, 510. But, as said in *Loshbaugh v. Birdsell*, 90 Ind. 467: "Whenever the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness, and the facts upon which an opinion is sought are such as men in general are capable of understanding, then the witness may express his opinion upon such facts." To the same effect it is said in *Yost v. Conroy*, 92 Ind. 471, 47 Am. Rep. 156: "Where the matter of which the witness speaks is one which he cannot describe, or which cannot be fairly presented to the jury without an opinion, their opinions are competent; \* \* \* or, where the conclusion is one arising from an observation of facts, opinions will be received." Mr. Wigmore, in his popular work on Evidence (volume 3, §§ 1918-1926, inclusive), argues for a much broader rule than we have indicated, and concludes the subject in these words: "The question must be asked on each occasion, 'Can the jury be fully equipped by the mere recital of the data to draw inferences?' In other words, 'Can all the data be exactly reproduced by mere testimonial words, and gestures?'" Section 1926. There is no claim but the witness was qualified to speak, both as an expert on the subject of drainage and from personal observation of the premises. Facts in such inquiries are always desirable, and should be given the jury when practicable, but, when imprac-

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licable, resort may be had to trustworthy opinions, formed from experience and observation.

Appellees' land lay in a flat and marshy district. The extent of the watershed that supplied the ditch was large, irregular, and unknown; could only be ascertained by a civil engineer. The fall of the water in its descent to the ditch, the obstructions on the surface, the character of the soil were all matters to be considered in determining the sufficiency of the 24-inch tile, and, however clear and fortunate the witness might have been in describing the facts and conditions, it is not at all probable that the jury were all sufficiently qualified from experience, or observation in similar affairs, as to duly appreciate all the material facts when proved. While, on the other hand, a witness who had had extended experience in observing and studying such things might, upon actual view, form an opinion that would reasonably approach exactness. *Heick v. Voight*, 110 Ind. 279, 11 N. E. 306. As a basis of opinions expressed as to the value of the land, before and after, witnesses were permitted, among other things, to describe the character of the soil and to name the various crops to which it was adapted; and this action of the court forms six separate exceptions. Since witnesses are permitted, from necessity, to express their opinion as to values in such cases, it seems impossible that a valid reason can be brought against the giving of the grounds of such opinions as a means of informing the jury of their reasonableness. And such is the current of authority. *Dickenson v. Fitchburg*, 13 Gray (Mass.), 546; *Chicago, etc., R. R. Co. v. Cicero*, 154 Ill. 656, 39 N. E. 574; *McClean v. Chicago, etc., Ry. Co.*, 67 Iowa, 568, 25 N. W. 782; *Missouri Pac. R. Co. v. Dulaney*, 38 Kan. 246, 16 Pac. 343; *Sexton v. Bridgewater*, 116 Mass. 200; *Burt v. Wigglesworth*, 117 Mass. 302; *Hawkins v. Fall River*, 119 Mass. 94; 2 Lewis, Em. Domain, § 435; *St. Louis, etc., Ry. Co. v. Lyman*, 57 Ark. 512, 22 S. W. 170; *Chicago & E. R. Co. v. Kern*, 9 Ind. App. 505, 36 N. E. 381. The cutting of fields into inconvenient shapes, the interruption of convenient ways for animals to pass from the farm buildings to and from pasture, the necessity for additional fencing are elements of damage and may be properly inquired into in a case like this. *Railroad Company v. McClure*, 29 Ind. 536; *Railroad Company v. Lansing*, 52 Ind. 229; *Railroad Company v. Hunter*, 128 Ind. 213, 27 N. E. 477.

The increased hazard from fire being set from passing locomotives is also a proper consideration for the jury in estimating the damage. *Plank Road Company v. Railroad Company*, 13 Ind. 90, 74 Am. Dec. 246; *Swinney v. Railroad Company*, 59 Ind. 205; *Railroad Company v. Murdock*, 68 Ind. 137.

Exception is also taken to the refusal of the court to give to the jury its request numbered 1, relating to the duty of the jury in weighing the opinions expressed by witnesses as to the value of the land, before and after. We perceive no valid objection to the instruction; and it is quite evident that the court's

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refusal was on the ground that the same subject-matter was fully covered by instruction No. 4, given by the court's own motion, and No. 3, given upon request of appellees. Considering the instructions as a whole, as is our duty, we are of the opinion that the instruction refused was substantially given, as above noted, and that no reversible error was committed.

Divers other objections to the giving and refusal of instructions are presented, but such objections have all been disposed of adversely to appellant by what has been said in former parts of this opinion. We find no error in the record.

Judgment affirmed.

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**INDIANAPOLIS & CINCINNATI TRACTION CO. v. LARRABEE *et al.***

(Supreme Court of Indiana, March 1, 1907.)

[80 N. E. Rep. 413.]

**Eminent Domain—Procedure—Remote Damages.\***—Damages resulting from danger to the person or stock of the owner of land from the construction and operation of a trolley line are too remote, uncertain, and speculative to be considered by the jury in fixing the amount of the owner's compensation for lands taken and for the depreciation in the value of the lands which will be damaged, but not actually taken, by the construction and operation of the proposed road.

**Same—Statutes Requiring Fencing.**—Under Acts 1903, p. 426, c. 227, interurban railroads are required to fence their right of way, and the danger to animals on the land adjoining, but not taken by them, will be only speculative, and should not be considered in determining the diminution of the market value of such land.

Appeal from Circuit Court, Hamilton County; Ira W. Christian, Judge.

Action by the Indianapolis & Cincinnati Traction Company against Thomas W. Larrabee and another. Judgment for defendants, and plaintiff appeals. Transferred from Appellate Court under section 1337j, Burns' Ann. St. 1901. Reversed and remanded.

*Marsh & Cook, G. D. Forkner, and W. S. Christian*, for appellant.

*Mason & Jackson and W. J. Beckett*, for appellees.

JORDAN, J. Appellant traction company is a corporation organized under the laws of Indiana governing the incorporation of street and interurban street railroad companies. These proceedings were instituted by appellant against appellees Thomas W. and Anna Larrabee, his wife, in the Hancock circuit court, by filing an instrument of appropriation, seeking thereby to

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\*See preceding case, and foot-note.

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condemn or appropriate, for a right of way for its electric railroad, certain land in said county belonging to appellee Thomas W. Larrabee. The strip of land appropriated embraced four acres and a fraction. Appraisers were appointed by the court, who subsequently filed their award of damages in the sum of \$800, to which appellant excepted. The cause was venued to the Shelby circuit court, and from thence the venue was changed to the Hamilton circuit court, wherein, on the issues joined by the parties, there was a trial by jury and a verdict returned in favor of appellees, assessing damages at \$800. A motion by appellant for a new trial was overruled and judgment was rendered on the verdict. The errors relied upon for reversal arise out of the ruling of the court in denying the motion for a new trial.

The questions discussed by the parties in this appeal relate to the amount of compensation to which appellee is entitled to recover for the land appropriated by appellant as to damages sustained by reason of any injury or depreciation in value of the remainder of the tract of land not taken by appellant by reason of the location and construction of the railway, etc., and questions arising out of the admission and rejection of evidence upon the trial and instructions given by the court. The court, at the request of appellant, gave some seven instructions to the jury. Six instructions were given on the request of appellee, No. 5 of which is as follows: "In assessing the damages that may be awarded to the said Thomas W. Larrabee, in case you find for him, you may take into consideration the shape and size of the parcel or parcels of land which remain; the difficulty of access and of communication between the different parts, if any, caused by such appropriation; any permanent interference with the drainage of the land or with the flow of surface water, or with the water supply; *the danger, if any, to which the occupants of the farm and the stock thereon, will be exposed*; and permanent interference with or loss of stock water on said farm; any permanent inconvenience, difficulty, or danger that may be caused to said Larrabee by reason of said appropriation; and the construction, maintenance, and operation of said electric traction road, in the cultivation, use, and enjoyment of the said farm of the said Larrabee by him, of a permanent character, and also all other injuries of a permanent character as shown by the evidence, if any, to the lands of the said Larrabee by said appropriation, in so far as the same, or any of the foregoing items, affect the market value of said farm." (Our italics.)

Appellant's counsel especially object to and criticise as erroneous all that part of the above instruction embraced in italics which authorizes the jury in assessing damages, to take into consideration the danger to which the occupants of the farm, and stock thereon, will be exposed. The argument is advanced that damages resulting from any danger or peril to which the person of the owner or occupant of the lands remaining unappropriated, or to any stock thereon, may be exposed, by reason of the con-



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struction or operation of the road in question, are too remote and speculative to be considered by the jury in fixing the compensation for the depreciation in value of the lands not actually appropriated, but which may be damaged by the construction or operation of the road. In this view of the law we concur:

The case of the Chicago, etc., Electric Railroad Co. v. Mawman, 206 Ill. 182, 69 N. E. 66, was a proceeding on the part of an electric railroad company to condemn a right of way for its road across certain lots or parcels of land. The trial court in that case, in instructing the jury in regard to the assessment of damages, among others, gave the following: "It is competent in this case to take into consideration the value of the land taken in the construction and use of the railroad, as well as damages on account of unfavorable division of the lands not taken by the construction and use of the railroad, *thereby causing inconvenience and danger to the person and property of the defendant, if shown, in the use and occupancy of the balance of the land.*" (Our italics.) Appellant's insistence in that appeal was that this instruction should not have included danger to the person of the defendant. The Supreme Court of Illinois, in considering the instruction, said: "The measure of respondents' compensation is the fair cash market value of the land proposed to be actually taken, having proper regard to the location and advantages as to situation and the purposes for which it was designed and used, and the amount, if any, which their lands not taken would be depreciated in their fair cash market value by the construction and operation of the proposed road. [Citing Chicago, Burlington & Northern R. R. Co. v. Bowman, 122 Ill. 595, 13 N. E. 814; Chicago, Milwaukee & St. Paul Railroad Co. v. Hall, 90 Ill. 42; Dupuis v. Chicago & North Wisconsin Ry. Co., 115 Ill. 97, 3 N. E. 720; Wabash, St. Louis & Pacific Ry. Co. v. McDougall, 126 Ill. 111, 8 N. E. 291, 1 L. R. A. 207, 9 Am. St. Rep. 539; Illinois Central Railroad Co. v. Turner, 194 Ill. 575, 62 N. E. 798.] Damages resulting from danger to the person of the owner of the land from the construction and operation of the road are too remote, uncertain, and speculative to be considered by the jury in fixing the amount of the owner's compensation for lands taken and for the depreciation in the value of the lands which will be damaged but not actually taken, by the construction and operation of the proposed road. McReynolds v. Burlington & Ohio River Railroad Co., 106 Ill. 152; Conness v. Indiana, Illinois & Iowa Railroad Co., 193 Ill. 464, 62 N. E. 221." For error in giving this instruction the judgment of the lower court was reversed.

In Chicago, etc., R. Co. v. Hunter, 128 Ind. 213, 27 N. E. 477, this court, in considering what damages were natural or reasonable incidents to the appropriation of lands by a railroad company for a right of way, said: "It may well be said as an abstract proposition that the damages proper to be awarded in such cases are only such as will result from a proper construction of the road. The presumption is that the road will be constructed in a

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proper manner. For injuries resulting from the negligent construction or from any willful misconduct in its construction an action will lie, notwithstanding the property has been regularly condemned and compensation awarded. [Citing authorities.] The rule in condemnation proceedings is that all damages, present or prospective, that are the natural or reasonable incidents of the improvement to be made, or work to be constructed, not including such as may arise from negligence or unskillfulness, or from the wrongful act of those engaged in the work, must be assessed. Damages are assessed once for all, and the measure should be the entire loss sustained by the owner, including in one assessment all injuries resulting from the appropriation. [Citing authorities.]” See, also, *New Jersey, etc., R. Co. v. Tutt* (at this term) 80 N. E. —.

Of course, the manner in which the remaining lands are divided by the right of way appropriated, in respect to the size and shape of the fields, or parcels, the condition in which the lands are left as to access to water for stock purposes, the means of passage from one part of the premises to another, and, in the case of steam roads, the possible danger from fire emitted from locomotives when properly equipped and operated to prevent the escape of fire, etc., these matters, and others which might be enumerated, are legitimate items of damages, to be considered relative to the depreciation of the market value of the residue of the lands out of which the right of way is carried. It is true that possibly some of these items in their nature are not susceptible of definite ascertainment; but, as the authorities affirm, if the jury, under the evidence, finds that such facts exist, they may consider whether or not they cause a depreciation in the market value of the remaining lands. *Chicago, etc., R. Co. v. Hunter, supra*; *Whitewater Valley, etc., R. Co. v. McClure*, 29 Ind. 536; *Grand Rapids, etc., R. Co. v. Horn*, 41 Ind. 479; *Ohio Valley Railroad, etc., Co. v. Kerth*, 130 Ind. 314, 30 N. E. 298; *Chicago, etc., R. Co. v. Winslow*, 27 Ind. App. 316, 60 N. E. 466; *New Jersey, etc., R. Co. v. Tutt, supra*; *Indiana Natural Gas, etc., Co. v. Jones*, 14 Ind. App. 55, 42 N. E. 487; *Chicago, etc., R. Co. v. Greiney*, 137 Ill. 628, 25 N. E. 798; *Conness v. Indiana, etc., R. Co.*, 193 Ill. 464, 62 N. E. 221; *Kansas City, etc., R. Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15.

While the amount of damages awarded in a condemnation proceeding by a railroad company for a right of way ought to be sufficient to embrace or cover the actual value of the lands appropriated, together with all damages occasioned by reason of the construction of the road over the right of way as appropriated, and for all physical injuries to the remaining lands and all inconveniences of every character actually caused or resulting to the remaining lands from the road's construction, yet certainly imaginary or speculative damages, or such as the occurring of which is very remote, should not be taken into consideration by the jury making the assessment. To this class belong damages resulting from danger or peril to which the owner or occupants of

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the remaining lands, or to stock kept thereon, will be exposed or subjected. Chicago, etc., R. Co. v. Palmer, 44 Kan. 110, 24 Pac. 342; Kansas City, etc., R. Co. v. Kregelo, *supra*; Chicago, etc., R. Co. v. Mason, 26 Ind. App. 395, 59 N. E. 185, and authorities there cited; Elliott on Railroads, § 991.

In regard to the danger of exposure to stock kept on the premises, it may be said that in view of the statute of 1903 (Acts 1903, p. 426, c. 227), imposing upon interurban railroads, traction lines, etc., the duty of constructing and maintaining fences on both sides of their right of way "sufficient and suitable to turn and prevent cattle, horses, mules, sheep, hogs or other stock from getting on such road, except at crossings of public highways," etc., such danger or peril will be nothing more than speculative or imaginary, and should not be considered by the jury in determining the diminution of the market value of the remainder of the lands unappropriated.

By the instructions given at the request of appellant the court very fully advised the jury in regard to appellee's theory of the case and the law relative thereto. Appellant's counsel criticise as erroneous other instructions given. While some of these charges are not as definite and clear as they might be, nevertheless we perceive no error therein prejudicial to the rights of appellant. Questions relative to rulings of the court in admitting and excluding certain evidence are argued by appellant's counsel, but under the condition of the record these in the main are not properly presented for review. Hence we passed them without consideration.

As the judgment must be reversed and a new trial ordered on account of the error pointed out in giving instruction No. 5, we do not deem it proper to review the evidence or consider the question as to whether the damages awarded by the jury are excessive. We conclude, however, that the jury may have been misled to the prejudice of appellant in the assessment of damages by reason of the erroneous instruction in controversy, for which error the judgment is reversed and the cause remanded, with instructions to the lower court to grant appellant a new trial.

LOUISVILLE & N. R. Co. *v.* SCOMP *et al.*

(Court of Appeals of Kentucky, Jan. 17, 1907.)

[98 S. W. Rep. 1024.]

**Eminent Domain—Compensation—Additional Use of Property.\*—**

Where a strip through a tract of land is condemned for railroad purposes, the railroad is not liable to the landowner for damages resulting from the laying of the additional tracks on the right of way not contemplated when the right of way was secured, in the absence of negligence in the operation of the road.

**Pleading—Conclusions—Ownership of Passway.**—An allegation in the petition that the plaintiffs owned a passway across defendant's railway track is not a mere conclusion of law.

**Same—Answer—Admissions—Failure to Deny.**—An allegation in the petition that plaintiffs owned a passway over a railroad track, not denied in the answer, must be taken as true.

**Railroads—Operation—Obstructing Private Road.**—A railroad is liable to the owner of a passway over its track for its obstruction only where the obstruction is negligent, and not where it is required in carrying on the business in the usual and necessary way.

**Same—Measure of Damages.**—The measure of recovery for the obstruction of a passway over a railroad by the negligent operation of the road is not the decrease in the value of the property from the obstruction, but the decrease in the value of its use within five years before the filing of the action therefor.

Appeal from Circuit Court, Boyle County.

"To be officially reported."

Action by William Scomp and others against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed and remanded.

*Charles R. McDowell, Benjamin D. Warfield, Edward W. Hines, and Chenault Huguely, for appellant.*

*Jno. W. Rawlings, Robt. Harding, E. V. Puryear, and Jno. C. Voris, for appellees.*

HOBSON, J. William Scomp owned a tract of land in Boyle county through which the Knoxville Branch of the Louisville & Nashville Railroad was located in the year 1865. Being unable to agree with Scomp, the railroad company filed in the Boyle county court a proceeding to condemn the right of way through his land 66 feet wide containing 2.54 acres. Scomp was not satisfied with the judgment in the county court, and appealed to the circuit court, where he obtained a judgment for \$125 for

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\*See preceding case, and foot-note.

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the land taken and \$1,375 for the consequential damages, making in all \$1,500. The railroad company then took possession of the right of way and built the railroad upon it. For many years after the railroad was built there was no station near Scomp's place. The trains passed through without stopping. About the year 1899 the railroad company, the better to carry on its business, put in a number of tracks and established a station at Scomp's place. This was due to these facts: A heavy freight business was done over the road, and one engine could pull from this point to Louisville  $1\frac{1}{2}$  times as much as it could pull from the Tennessee line to this point. So the company made this a point for breaking up trains, and the additional tracks referred to were established for that purpose. Scomp's house and stable stood very near to the railroad, and the pike which he traveled was on the opposite side of the railroad from his house. For many years he has used a passway across the railroad in front of his house over to the pike. The establishment of the additional tracks, the stopping of the trains, and the making up of trains at this point interfered very much with the use of the passway, and this action was filed in September, 1903, to recover damages.

In the first paragraph of the petition it was charged that within five years the defendant had built the additional tracks not considered or contemplated when the right of way was secured, and was continually moving cars upon them in close proximity to the plaintiff's residence, thereby causing loud noises, throwing soot, smoke, and cinders upon the premises, jarring them, and greatly damaging them as a habitation. For this damages were prayed in the sum of \$5,000. In the second paragraph it was averred that the plaintiff owned the passway referred to, that it afforded the means of ingress and egress to and from the premises, and that since the additional tracks had been built the defendant was continually storing and putting in and taking out cars on these tracks, in front of the house and over the passway, running and switching cars across it in great numbers continually, thereby obstructing the passway and making it dangerous to pass over it. For this damages were prayed in the sum of \$1,000. The court overruled the defendant's demurrer to each paragraph of the petition, but when the evidence came to be heard he ruled that there could be no recovery under the first paragraph and gave the jury this instruction at the law of the case: "If you believe from the evidence that prior to the institution of this action, August 31, 1903, and within five years prior thereto, the defendant built a side track and a Y near to and in close proximity to plaintiffs' residence and lands for storing cars thereon and switching purposes, and in the operation of same by defendant the passway of the plaintiffs has been obstructed, so as to prevent the reasonable use of same for purposes of ingress and egress to and from their lands, and because thereof the said lands have been depreciated in value, then you should

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find for plaintiffs such sum as you believe from the evidence will reasonably compensate them for such depreciation in the value of said lands, if any, because of such obstruction of said passway, not to exceed, however, the sum of \$1,000; and if you do not so believe you should find for defendant." The jury found for the plaintiffs in the sum of \$1,000, on which the court entered judgment, and the defendant appeals.

The court should have sustained the defendant's demurrer to the first paragraph of the petition, and no evidence relating to these matters should have been admitted before the jury. When the defendant condemned the right of way and took title to the strip of land condemned for the railway, it acquired the right to use it, not only for the one track which it originally built, but for such additional tracks as from time to time it may find it necessary to build or deem useful in its business. It has the right to devote the entire strip to its purposes as provided in the judgment of the court, and all damages from the use of this strip for railway purposes are included in the original assessment. The plaintiffs cannot now complain that more tracks have been laid on the land than were contemplated at that time, or that trains, instead of running by as they formerly did, are now stopped and broken up. The defendant must serve the public. It has the right to make stations on its own land as the exigencies of the public service may require, and to stop and break up its trains at any stations it sees proper. When land is condemned for railroad purposes, the strip is taken, not with reference alone to the present needs of the company, but for all needs which the future may develop. The plaintiffs have, therefore, no cause of complaint that the defendant built the additional tracks referred to, or broke up its trains, or stored its cars on these tracks. There is no allegation in the petition that any of the acts of the defendant were negligently done or were unnecessary in the careful and proper operation of trains. The defendant has the right to operate its road on the strip; but it must do this in the usual and proper way, and it is liable to the plaintiffs for any damages they may sustain by the negligent and improper operation of the railway. But as the record is now presented there is neither allegation nor proof to sustain a recovery upon this ground. *L. & N. R. Co. v. Orr*, 91 Ky. 111, 15 S. W. 8; *I. C. R. R. Co. v. Hodge*, 55 S. W. 688, 21 Ky. Law Rep. 1479. 2 Lewis on Eminent Domain, § 565.

As to the second paragraph of the petition, the averment that the plaintiffs owned the passway is not a statement of a mere conclusion of law. The allegation that the plaintiff is the owner of certain property was a sufficient allegation at common law, and it is good under the Code. In the case of *Clark v. Hart*, 98 Ky. 33, 32 S. W. 216, it was averred in the petition simply that the plaintiffs had a right to go over the passway. The petition there showed that the plaintiffs did not own the passway, and it did not show any facts giving them a right to



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use it. The allegation here is that the plaintiffs own the passway, and this is sufficient. The proof does not show how the plaintiff became entitled to the passway. It does not seem to have been referred to in the condemnation proceedings. The allegation in the petition that the plaintiffs owned the passway is not denied in the answer, and therefore must be taken as true on the appeal. From the facts shown it would seem probable that the plaintiffs had a road out to the pike where the passway now is when the railroad was built, and that they have continued to use it since that time. No evidence was introduced on the trial on the subject of the title to the passway, as no issue had been formed on it; and as to what the rights of the parties are in the matter we express no opinion, as the facts are not before us.

Ordinarily a private crossing over a railroad is subject to the use of the railroad by the trains. The persons using the passway must keep out of the way of the trains, and they can only use the passway when the track is not occupied by the trains. The railroad has the right to use its track or tracks in the ordinary conduct of its business, and the persons claiming the passway cannot complain that the business of the railroad company is carried on in the usual way or as necessity may require. The railroad company may not negligently obstruct the passway, or needlessly do so; but it may increase its trains as the business may require, and it may lay additional tracks, and use these tracks with its trains as its business may require. The instruction which the court gave should have omitted all reference to the additional tracks laid by the defendant, and should only have allowed a recovery for such obstruction of the passway as was not due to the prudent and proper operation of the railway. If the passway was simply used by the plaintiffs by acquiescence on the part of the railroad company, and was not held as a legal right, then the railroad company had a right to run its trains as it pleased, and stop them when it pleased, and the plaintiffs cannot complain. But, if the passway was held as a legal right, then the railroad company cannot obstruct it negligently with its trains. It could only use the passway with its trains in the usual course of business, conducted with proper care. To illustrate: If the defendant, in consideration of the plaintiffs' granting it elsewhere a strip of ground, had granted the plaintiffs this passway, it would not be allowed to violate its deed, made for a valuable consideration. It could not fence up the passway, and it cannot do by indirection what it could not do directly. But the measure of damages for this is not the decrease in the value of the property from the obstruction of the passway by the building of the side tracks and the use of them by the cars. The proof shows that the turnpike crosses the railroad and may be reached on the plaintiffs' own land at a distance of 200 feet from the passway. Although the railway may have negligently obstructed the passway at different times in the past, it may not negli-

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gently obstruct it in the future. The obstruction of the passway by standing cars across it is not a continuous thing. The proof shows that trains sometimes stand across the passway some minutes. On one occasion a train obstructed it for an hour, and on another occasion for half an hour. Still such obstructions may not occur again, and only damages for what has been done negligently can be recovered. The measure of recovery, if the passway is held as a legal right, is the diminution, if any, in the value of the use of the property within five years before the filing of the suit, by the obstruction of the passway from trains standing upon it an unreasonable time by reason of the negligent operation of the road. And in determining this the jury should consider the practicability of another outlet to the pike over the plaintiffs' own land. See *L. & N. R. R. Co. v. Carter*, 86 S. W. 685, 27 Ky. Law Rep. 748.

The rule allowing a recovery of damages where ingress and egress to and from the property has been obstructed by a railway built in a street under municipal authority has no application where, as here, the right of way over private property was condemned and the damages assessed for the land have been paid. The cases relied on for appellees are, therefore, not applicable. In *Bramlette v. L. & N. R. R. Co.*, 68 S. W. 145, 24 Ky. Law Rep. 181, Bramlette's property had not been condemned under the power of eminent domain. The same is true of *L. & N. R. R. Co. v. Walton*, 67 S. W. 988, 24 Ky. Law Rep. 9. Where the land has been condemned and the damages paid, ingress and egress to and from the property are matters conclusively presumed to have been considered in the assessment of the damages in the condemnation suit.

There is no allegation in the second paragraph of the petition of negligence in the operation of the trains, and the defendant's demurrer to this paragraph, also, should have been sustained. On the return of the case the circuit court will allow the plaintiffs to amend their petition, and will also allow the defendant to amend its answer.

Judgment reversed, and cause remanded for a new trial.

BUSBY *v.* YAZOO & M. V. R. Co.

(Supreme Court of Mississippi, Feb. 18, 1907.)

[43 So. Rep. 1.]

**Principal and Agent—Unauthorized Act—Duty to Ascertain—Authority.**—Where one deals with agents of a railroad, he must learn the scope of their authority, or act at his own peril.

Appeal from Circuit Court, Wilkinson County; M. H. Wilkinson, Judge.

Action by W. H. Busby against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Action for breach of contract for failure to construct a switch track to plaintiff's sawmill under an alleged contract entered into between plaintiff and the roadmaster and traveling freight agent of defendant, by which plaintiff alleges it was agreed that, upon his doing the grading and furnishing the crossties, the railroad company would lay the track. The defendant denied that any of its agents had entered into any contract with plaintiff to construct the spur track, and denied the authority of the officials named by plaintiff to make such a contract, which would in any way bind defendant. After hearing all the evidence, the court gave a peremptory instruction for defendant, and plaintiff appeals.

*Clem V. Ratcliff*, for appellant.

*Mayes & Longstreet*, for appellee.

CALHOON, J. It is abundantly shown by direct evidence that neither Mr. Downs, the roadmaster, nor Mr. O'Conner, the traveling freight agent, had any authority to contract for the switch track. So, if either tried to make such contract, which is denied, no power existed; and there is no evidence, direct or indirect, or of custom or precedent, that there was such power or authority, and those who deal with an agent, or supposed agent, must learn the scope of the agency, as to which they act at their peril.

Affirmed.

NASHVILLE, C. & ST. L. RY. *v.* HAYES.

(Supreme Court of Tennessee, Jan. 19, 1907.)

[99 S. W. Rep. 362.]

**Master and Servant—Injury to Servant—Burden of Proof.\***—A brakeman, suing for injuries received while in switching cars by being struck by an obstruction near the track, has the burden of proving, not only the existence of the obstruction, but also that the company had notice thereof, or by ordinary care could have obtained notice thereof.

**Same—Negligence—Obstructions over Railroad Track.†**—In an action by a brakeman for injuries received in switching cars by being struck by a chute projecting from a warehouse, the evidence did not show by whom the chute was placed, or when it was so placed, or how long it had been there. It could have been there but a short time. Held insufficient as a matter of law to show negligence on the part of the company.

**Same—Contributory Negligence.‡**—A brakeman, suing for injuries received while switching cars by being struck by an obstruction near the track, testified that the agent had charge of the track and it was his duty to see that the track was kept clear, that the agent had told the men that if they saw anything wrong to tell him about it, and that it was the duty of the brakeman to look for obstructions on the track. The brakeman failed to see the obstruction until too close to it to escape injury. Held, that the injury resulted from a failure of the brakeman to discharge his duty by looking out for such an obstruction, precluding a recovery.

**Same—Instructions.§**—An instruction, in an action by a brakeman

\*See foot-notes appended to *St. Louis, etc., R. Co. v. Hill* (Ark.), 21 R. R. R. 20, 44 Am. & Eng. R. Cas., N. S., 20; *Hemphill v. Buck Creek Lumber Co.* (N. Car.), 20 R. R. R. 411, 43 Am. & Eng. R. Cas., N. S., 411; *Fitzgerald v. Southern Ry. Co.* (N. Car.), 20 R. R. R. 368, 43 Am. & Eng. R. Cas., N. S., 368; foot-notes appended to *Northern Pac. Ry. Co. v. Dixon* (C. C. A.), 20 R. R. R. 242, 43 Am. & Eng. R. Cas., N. S., 242.

†For the authorities in this series on the subject of the duties and liabilities of railroad companies, as masters, with respect to structures located near or over tracks, see foot-notes appended to *Denver & G. R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361.

‡For the authorities in this series on the subject of contributory negligence and assumption of risks where employees fail to comply with the master's rules and regulations, or orders, see foot-notes appended to *Baltimore & O. R. Co. v. Doty* (C. C. A.), 17 R. R. R. 753, 40 Am. & Eng. R. Cas., N. S., 753; foot-notes appended to *Illinois Cent. R. Co. v. Stith's Adm'x* (Ky.), 16 R. R. R. 729, 39 Am. & Eng. R. Cas., N. S., 729; foot-notes appended to *Moore v. St. Louis, etc., Ry. Co.* (La.), 16 R. R. R. 370, 39 Am. & Eng. R. Cas., N. S., 370; *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232.

§For the authorities in this series on the question whether con-

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company. The warehouse itself stood near to the track upon which these cars were moving. According to the weight of the testimony it would seem that, whether the cars were in motion or standing still, one in passing between them and the warehouse would have to move with caution, and according to some of the testimony in the case sideways, rather than with the full face to the front. The space between the warehouse and the freight car upon this track was about 19 inches in width. One end of the brick chute rested on the ground inside of the warehouse inclosure. From that point it passed over and lay upon the fence referred to, beyond which the upper end projected in the direction of the railroad track. It was with the end so projecting that the defendant in error came in collision as he was clinging to the ladder upon the side of the box or freight car, which was being moved to that part of the track near the warehouse where it was to be placed for loading.

While it is evident from the record that this obstruction might have been seen by the defendant in error at a point sufficiently remote therefrom to have enabled him to have put himself in a place of security, yet he did not see it until he was within 10 or 12 feet of it. How long this obstruction had existed the record does not show, nor is it shown by whom the chute was placed in that position. Neither the plaintiff below nor any of his witnesses could fix the date when the last car load of brick had been unloaded at this warehouse. One of the witnesses stated in a hesitating and unsatisfactory manner that brick had been unloaded some little time before the date of this accident, possibly a week. Parties who were in charge of the warehouse testified that, according to the records kept there of freight received, the last car load of brick reached and was unloaded there in November, 1904, some four months before the day of the injury received by the plaintiff below.

As has already been stated, no witness undertook to say when this chute was placed in the position it occupied when the collision in question occurred. The two Shapards, who were engaged as employees or otherwise in this warehouse, stated that the Saturday immediately preceding this accident, which occurred on Monday, they were in that part of the premises where the chute was, and they did not notice that it was lying across the fence. One of these witnesses states in the course of his examination that he thinks it was taken by some one to him unknown from the place where it was usually kept, "back in the yard across the brick," when it was not being used, and thrown across the fence, where it was at the time of the injury.

It is true witnesses state that about the lower end of this chute there were bricks piled, and that they were frozen. But we do not think, from this fact alone, the inference could be drawn that the chute had been in that position for any considerable length of time, inasmuch as the record shown that the weather was then cold, and "that it was sleeting and freezing," so that in a very short time after it had been so placed

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the brick around the lower end would be naturally covered with ice. In addition, we think it clear that this obstruction could have existed but for a short time, because the defendant in error and the other employees were passing along that track frequently, if not several times every day, and it can hardly be supposed that this obstruction could long have existed without attracting the attention of some one of these parties.

While it is true that the railroad company was under obligation to the defendant in error to exercise ordinary care to see that he was furnished a safe place in which to do his work, yet, upon a record which fails to show that any of its agents had placed the chute in its dangerous position, and whether this obstruction had existed only a few minutes, or an hour, or a day before the accident occurred, upon well-settled legal principles was the verdict of the jury authorized, or can the judgment of the court thereon be sustained? In other words, in the absence of evidence tending to show by whom the chute was placed so as to project over or near the track, or when it was so placed, or how long it had been there, was there any material evidence of negligence upon the part of the railroad company upon which the jury could base a verdict in favor of the plaintiff below?

We think the rule to be applied in answering these questions has been recognized by this court in a number of cases, and especially in that of *Railroad v. Lindamood*, reported at page 473 in 111 Tenn., and at page 99 of 78 S. W. In the opinion in that case it was said that, as between the employer and employee, there is no presumption of negligence on the part of the former in furnishing appliances to the latter arising from the injury itself. Following this statement of the rule, the opinion embodies approvingly the following extract from Mr. Wood's work on the Law of Master and Servant:

"From the mere fact that an injury results to a servant from a latent defect in machinery or appliances of the business, no presumption of negligence on the master's part is raised. There must be evidence of negligence connecting him with the injury.

\* \* \* The mere fact that the machinery proved defective and that the injury results therefrom does not fix the master's liability. Prima facie, it is presumed that the master has discharged his duty to the servant and that he was not at fault. Therefore the servant must overcome this presumption by proof of the fault on the master's part, by showing either that he knew or ought to have known of the defects complained of.

\* \* \* The burden of proving negligence upon the part of the master is upon the servant, and he is bound to show that the injury arose from the defects known to the master, or which he would have known by the exercise of ordinary care, or that he has failed to observe precautions essential to the protection of servants which ordinary prudence would have suggested. \* \* \*

The servant, seeking recovery for an injury, takes the burden upon himself of establishing negligence upon the part of the



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master and due care on his own part. And he is met by two presumptions, both of which he must overcome in order to entitle him to a recovery: The first, that the master has discharged his duty to him by providing suitable instrumentalities for his business and keeping them in condition; and this involves proof of something more than the mere fact that the injury resulted from a defect in the machinery. It imposes upon him the burden of showing that the master had notice of the defect, or in the exercise of that ordinary care which he is bound to observe he would have known it. When this is established, he is met by another presumption, the force of which must be overcome by him, and that is that he assumed all usual and ordinary hazards." Sections 368 and 382.

The rule stated by this author, which measures the quantum of evidence which the employee must furnish in order to maintain his action for an injury received in his master's service upon the ground of actionable negligence on the latter's part, is found in the text of the following authors: Of Mr. Bailey, in his work on Master and Servant (section 360); of Shearman & Redfield, in their work on Negligence (section 223); of Judge Thompson, in his work on Negligence (volume 4, § 3601); of Judge Elliott, in his work on Railroads (volume 3, § 1307); and of Mr. Labatt, in his work on Master and Servant (volume 1, § 129).

It is evident that the rule which would require that the switchman whose duty it was to couple and uncouple the cars in the yards of a railroad company, and who, while discharging that duty, was injured by reason of a defect in the spring or appurtenances connected with the drawbar of a passenger coach, and sought to recover damages for the injury, not only to prove such defect, but also that the railroad company had notice of the defect, or that by the exercise of reasonable or ordinary care it could have obtained such notice (*Atchison, etc., R. R. v. Wagner*, 33 Kan. 660, 7 Pac. 204), or would impose the same burden in a case like that of *Lindamood v. Railroad*, *supra*, can equally be invoked when an employee, injured as was the defendant in error, by coming in contact with an obstruction on or near the track when riding upon one of its cars in the discharge of his duty, seeks to recover from the employer on the ground of negligence.

We think, in view of this rule of law, that the assignment of error that there is no material evidence to support this verdict is well taken; and it is sustained. But there is another and distinct ground upon which a reversal of this judgment may be safely rested; and that is, upon his own testimony, it was a part of the duty of the defendant in error to look out for such an obstruction as that which he encountered and reported the same to his superior, in order to its removal. We think that the statement of the plaintiff below in this regard when upon the witness stand was not an inadvertence upon his part, but that he understood this to be a part of the service which he had

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contracted to render to the company. He is asked by his counsel on direct examination: "Who had charge of the track, and whose duty was it to see that the tracks were kept clear?" And his answer was: "Well, it was the agent's. He always told us, if we saw anything wrong, to come and tell him about it, and he would have it moved." What may be somewhat ambiguous in this answer becomes clear in his answers to several interrogatories put to him on cross-examination. The following is a part of this cross-examination: "Now, as you were riding down there that day, it was part of your duty to look for obstructions on or near the track, and to have reported them? A. Yes, sir; when I saw it, I was right on it. Q. But, as you came down the track that day on the side of that car, it was a part of your duty known to you, to look out for obstructions like this plank that struck you? A. That is right."

It is true, as urged by counsel of defendant in error, that he was a negro, and possibly of no superior intelligence, yet he is necessarily bound, as is every litigant, by the record which he makes for himself. After a careful examination of his testimony, we find nothing in it to modify or qualify to any degree this statement as to his duty to look out for and report the existence of such obstructions as the one in question. This being so, we understand the law to be well settled that, where an injury results to an employee from a failure to discharge a duty which he owes to his employer, the latter cannot be called upon by him to respond in damages.

As said by Mr. Thompson, in his work on Negligence (section 4416): "An employee cannot recover damages from an employer for an injury proceeding from a defect in something for the safe condition of which the employee himself was responsible. This rule applies where the servant himself undertakes with the master to see to the safety of the premises or appliances about which or with which he works. \* \* \*"

To the same effect is Labatt on Master and Servant, § 416.

This principle, the mere statement of which carries conviction, and which would seem to need no citation of authority in support, will be found illustrated in many reported cases, among which are the following: *Chicago, etc., R. R. Co. v. Driscoll* (Ill.) 52 N. E. 921; *N. W. R. Co. v. Emmert*, 83 Va. 640, 3 S. E. 145; *Peppett v. Mich., etc., R. Co.*, 119 Mich. 640, 78 N. W. 900.

It was one of the contentions of the defendant below that the plaintiff below was guilty of negligence which proximately contributed to his injuries, and that this precluded a recovery, even if it be that the defendant below was also guilty of negligence. In the first place, it was said, as has already been stated, that it was the duty of Hayes to observe and report to the agent of the company the existence of any obstruction to the free passage of cars and persons riding upon them in and about tracks in the yards of the company, and that in his failure, with his opportunity of discovering it, to ascertain and re-

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port the existence of the obstruction in question, he was guilty of such negligence; and, further, independent of the contractual duty of Hayes in that regard, it was contended that by the exercise of ordinary care the defendant in error could have seen this obstruction for a considerable distance before it was reached and in time to put himself in a place of safety.

Again, on this point it was said that this spur track was placed so near the Shapard warehouse that, even without the existence of this obstruction, it was dangerous for one to ride upon the side of a car next to the warehouse; that, hanging to the ladder on that side of the car, one was put in peril of being injured by collision with the warehouse itself; and plaintiff, knowing fully these physical conditions, was guilty of gross negligence in placing himself in that position on this moving car, when the record shows that there was a ladder on the other side of the car on which he could have stood in perfect security, and from which he could have gone and discharged the duty of coupling and uncoupling these cars with perfect ease. In view of the evidence that was submitted by the defendant in seeking to maintain one or all of these contentions, it is insisted, and we think properly, that the circuit judge was in error in saying to the jury, in one of the paragraphs of his charge, that "if the condition of this obstruction was known, or by the use of ordinary care should have been known, to the local agent of the railroad, and the jury found that the permitting of such obstruction to be so placed or to remain was an act of negligence on the part of the railroad company, and was the proximate cause of the injury received by defendant in error, and that his act in climbing upon the car on the side next to the obstruction, or his not seeing the obstruction sooner than he did, and not moving from the place he occupied upon the ladder, was not such contributory negligence, and was solely the proximate cause of the injuries inflicted, or as made plaintiff equally negligent in proximately causing the injuries, then and in that event the plaintiff should recover." In other words, the trial judge in this paragraph said to the jury that, if they should find that the railroad company was guilty of negligence in failing to remove the obstruction that caused the injury, after its existence was known, or by the use of ordinary care should have been known, to the company, and that the collision with this obstruction was the proximate cause of the injuries received by Hayes, then he was entitled to recover, unless his own negligence was the sole proximate cause of the injury, or such as made him equally guilty of negligence with the defendant in proximity bringing it about. We think in both respects the circuit judge was wrong. In a case such as this the rule is well settled in this state that the plaintiff would be repelled if his negligence in any degree, whether great or small, proximately contributes to the injury received. It may not be the sole proximate cause, nor need he be equally guilty of negligence with the defendant. *Railroad v. Fain*, 12 Lea 39; *Railroad v. Fleming*, 14 Lea 136;

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*Saunders v. City, etc., R. R. Co.*, 99 Tenn. 135, 41 S. W. 1031; *Barr v. Railroad Co.*, 150 Tenn. 547, 58 S. W. 498.

It is insisted that the trial judge was in error in failing to grant the motion made by defendant below for peremptory instructions to the jury to return a verdict in its favor. The record, however, is in no condition for this court to grant the plaintiff in error the benefit of this assignment. The motion, though made, as shown by the bill of exceptions, was not pressed by the counsel to a ruling by the circuit judge. It is contended, however, that the necessary inference is that the motion was overruled by him, from the fact the trial judge, immediately following this motion, gave the case in a general charge to the jury. However ingenious this view is, yet it cannot be maintained, so as to put the trial judge in error, in the absence of affirmative action on his part. What is here urged might be equally so in a case brought from a lower court, the consideration of which by this court depended upon the making and overruling of a motion for a new trial. In such a case, the record showing this motion was made, but failing to show any action thereon, it could hardly be insisted that the errors of the court below could be corrected here. It is the duty of the litigant, who in the course of a trial objects to the introduction of testimony on the ground of incompetency, or who has been cast in the lawsuit by his adversary and moves for a new trial, to invoke the action of the lower court upon these respective motions, and, failing to do so, he will not be heard to complain in this court in any particular. A fortiori, this must be true with regard to a motion for peremptory instructions, which, when properly granted, is determinative of the case in the court below, and also in this court.

It follows, from what has been said, that the judgment of the lower court must be reversed, and the case remanded for a new trial.

## CREOLA LUMBER CO. v. MILLS.

(Supreme Court of Alabama, Dec. 20, 1906.)

[42 So. Rep. 1019.]

**Master and Servant—Injuries to Servant—Fellow Servants—Complaint—Statutes.\***—A complaint in an action for injuries to a brakeman while operating a logging train, which alleges that plaintiff was working under the engineer, who was intrusted with the superintendence of the operation of the train and of plaintiff, and that while plaintiff was engaged in operating the train he was injured, and that the injuries were caused by the negligence of the engineer while in

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\*For the authorities in this series on the subject of the applicability of employers' liability acts, see foot-notes appended to *Hemphill v. Buck Creek Lumber Co. (N. Car.)*, 20 R. R. R. 411, 43 Am. & Eng. R. Cas., N. S., 411.

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the exercise of such superintendence, shows that the injuries were caused by the negligence of the engineer while acting in his capacity as superintendent, and not in his capacity as engineer, within Code 1896, § 1749, subd. 2, making an employer liable for an injury to a servant caused by the negligence of one having any superintendence intrusted to him.

**Same—Allegation of Negligence—Sufficiency.**†—Where the complaint in an action for injuries to an employee shows the duty of the employer to exercise care and the failure to perform the same, the negligence causing the injuries may be averred in general terms.

**Same.** —A complaint, in an action for injuries to a brakeman operating a logging train, which alleges that the engineer in charge of the train was intrusted with the superintendence of the operation thereof and of the brakeman, and that the brakeman's injuries were caused by reason of the negligence of the engineer, to whose directions the brakeman at the time of the injury was bound to and did conform, and that the injuries resulted from the brakeman having so conformed and while the engineer was in the exercise of superintendence, states a cause of action within Code 1896, § 1749, subd. 3, making an employer liable for an injury to an employee caused by the negligence of a co-employee, to whose orders or directions the employee was bound to and did conform; the gravamen of the complaint being that the injury resulted from the brakeman having conformed to an order given by a co-employee, to whose orders he was bound to conform.

**Same.**†—A complaint based on Code 1896, § 1749, subd. 3, making an employer liable for injuries to an employee caused by the negligence of a co-employee, to whose orders the employee at the time of the injury was bound to and did conform, must aver the order given and conformed to and that the order was negligently given.

**Same.** —A complaint, in an action for injuries to a brakeman operating a logging train, which alleges that the injury was caused by the negligence of the engineer employed to operate the train while so "engaged in the operation" thereof, alleges that the engineer had "charge or control" of the train, within Code 1896, § 1749, subd. 5, making an employer liable for an injury to an employee caused by the negligence of a co-employee having the "charge or control" of a train.

**Same—Contributory Negligence—Question for Jury.**‡—It is not,

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†For the authorities in this series on the subject of the general rules applicable to pleading negligence, see foot-notes appended to *Southern Ry. Co. v. Blanford's Adm'x* (Va.), 21 R. R. R. 646, 44 Am. & Eng. R. Cas., N. S., 646; *McAndrews v. Chicago, etc., Ry. Co.* (Ill.), 21 R. R. R. 102, 44 Am. & Eng. R. Cas., N. S., 102; *Grand Trunk W. R. Co. v. Melrose* (Ind.), 21 R. R. R. 11, 44 Am. & Eng. R. Cas., N. S., 11; *Birmingham Ry., etc., Co. v. Jones* (Ala.), 20 R. R. R. 568, 43 Am. & Eng. R. Cas., N. S., 568.

‡For the authorities in this series on the question whether there can be recovery for injuries to employees caused by their attempts to board moving cars or engines, see foot-notes appended to *Wise Terminal Co. v. McCormick* (Va.), 19 R. R. R. 23, 42 Am. & Eng. R. Cas., N. S., 23.

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under all circumstances, as a matter of law, negligence for a brakeman to dismount from a moving train and attempt to board the locomotive, though the act of dismounting is unnecessary.

**Appeal—Harmless Error—Rulings on Demurrers to Pleadings.**—In an action for injuries to a brakeman operating a logging train, a plea alleged that he negligently placed his foot on the railroad track immediately in front of a locomotive operated thereon, and thereby suffered the injuries. A second plea averred that his foot was on the track of the road, and a demurrer thereto was sustained. Held that, as the employer was entitled under the first plea to prove the defense set up by the second, the sustaining of a demurrer thereto was harmless.

**Master and Servant—Injury to Servant—Plea on Contributory Negligence—Sufficiency.**§—A plea, in an action for injuries to a brakeman on a logging train, that he contributed to the injuries, "in that he negligently attempted to get upon the locomotive \* \* \* while the same was in motion," is demurrable for failing to aver the facts showing negligence in his attempt to board the locomotive.

**Same—Proof of Negligence—Burden of Proof.\*\***—An employee, suing his employer for personal injuries, has the burden of proving that the negligence charged was the direct and immediate efficient cause of the injuries complained of.

**Same—Evidence—Sufficiency.**—In an action by a brakeman on a logging train for injuries received while obeying the engineer controlling the train, evidence examined, and held insufficient to show that obedience of the order of the engineer was the cause of the injuries, essential to a recovery under the pleadings.

**Same—Assumption of Risk.†**—Where a brakeman was charged with the duty of sanding the track, the danger of boarding the locomotive while the train was moving, to reach the position for sanding the track, was incident to the business and assumed by him.

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Robert Mills against Creola Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

*Stevens & Lyons*, for appellant.

*Gregory L. & H. T. Smith* and *Chas. L. Bromberg*, for appellee.

DENSON, J. This is a suit by the plaintiff (appellee) against the defendant, Creola Lumber Company, a corporation, to recover damages for a personal injury suffered by him while in the defendant's employment as a brakeman. The complaint as

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§See foot-notes appended to *Brown v. Oregon R. & Nav. Co.* (Wash.), 20 R. R. R. 595, 43 Am. & Eng. R. Cas., N. S., 595.

\*\*See preceding case, and foot-notes.

†See foot-note on preceding page.



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it was originally filed contains three counts. Two counts were afterwards added by amendment. The court, at the request of the defendant in writing, charged the jury that the plaintiff could not recover on the third and fifth counts; so that the only assignments of error with respect to the court's rulings on the demurrers addressed to the complaint, which must be considered, are those which relate to and challenge the sufficiency of counts 1, 2, and 4 as they were last amended on the 9th day of February, 1905. After the amendment of February 9, 1905, was made to the complaint, the defendant was allowed to refile to the complaint as amended the demurrer filed December 26, 1904.

The first count is grounded on the second subdivision of section 1749 of the Code of 1896. This count alleges that the defendant was engaged in operating a train propelled by steam for hauling logs near Creola, in Mobile county, and employed an engineer, fireman, and the plaintiff to operate said log train. From these allegations, in connection with subdivision 2 of section 1749 of the Code of 1896, there arose a duty on the part of the defendant to the plaintiff to see to it that he was not injured by the negligence of any person, in the service of the defendant, who had superintendence intrusted to him, while in the exercise of such superintendence. *K. C., M. & B. R. R. Co. v. Burton*, 97 Ala. 241, 12 South 88. This count, after alleging that plaintiff was working under the engineer, Frank Driesbach, alleges that said Driesbach was intrusted by defendant with the superintendence of the operation of said log train and of the plaintiff, and that while the plaintiff was engaged in the service of defendant in operating the log train he was injured, setting forth the nature and extent of the injury. Then follows this averment, namely: "And the plaintiff avers that said injuries were caused by reason of the negligence of said engineer [Driesbach] whilst in the exercise of such superintendence aforesaid."

One instance of the appellant is that the count does not advise the defendant whether it must defend against negligence on the part of the engineer as such, or negligence on the part of the same man in his capacity as superintendent of the plaintiff. We think this criticism of the count is without foundation, for the only negligence counted on is that of Driesbach in his capacity as superintendent and whilst in the exercise of such superintendence; and uncertainty as to which subdivision of the statute the first count is based on cannot be predicated of the court. It has been many times held by this court that, the duty to exercise care being shown and the failure to perform that duty, "the negligence causing the injuries complained of may be well averred in the most general terms, little, if at all, short of the mere conclusions of the pleader; and this, upon the entirely sufficient consideration, among others, that if the defendant has been guilty of negligence he knows as well or better than the plaintiff can in what that negligence consisted." So there is

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no merit in the grounds of the demurrer raising the question of generality of averment as to negligence. *Postal Tel. Co. v. Jones*, 133 Ala. 217, 32 South. 500, and cases there cited; *Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 South. 700; *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143, 10 South. 87; *Illinois Car & Equipment Co. v. Walch*, 132 Ala. 490, 31 South. 470. The demurrer to the first count was properly overruled.

The second count of the complaint, after averring, substantially as was done in the first count, the relation of master and servant existing between the defendant and plaintiff, the superintendence of Driesbach, and plaintiff's injury, ascribes the injury to the negligence of Driesbach in this language: "And the plaintiff avers that said injuries were caused by reason of the negligence of said Frank Driesbach, who was in the service or employment of the defendant, and to whose orders or directions the plaintiff at the time of the injury aforesaid was bound to conform, and did conform, and said injuries resulted from his having so conformed, and whilst said Frank Driesbach was in the exercise of such superintendence aforesaid." This count is based on subdivision 3 of section 1749 of the Code of 1896, and the question is whether it is sufficient as against the demurrer filed to it, which is the same demurrer as that filed to the first count. With respect to the demurrer to the second count it is insisted in the brief of appellants: First, that the count combines the allegations required under subdivisions 2, 3, and 5 of section 1749 of the Code of 1896, and there is nothing in it to advise the defendant whether it must defend against a claim based on a negligent superintendence of the plaintiff by Driesbach, or a negligent ordering or directing of the plaintiff by the said Driesbach, or a negligent handling of his train by Driesbach. Second, that the count fails to aver what order Driesbach gave, or that the order or direction, conformance to which it is alleged caused the injury, was negligently given by Driesbach.

In respect to the first insistence it is sufficient to say that it is no objection to the count under this subdivision that it avers that the negligence complained of was that of a certain employee of the defendant, who was an engineer, and who had superintendence intrusted to him in respect to the operation of the train. This, as was said in *Kansas City, Memphis & Birmingham R. R. Co. v. Burton*, 97 Ala., at top of page 249, 12 South., at page 92, "is not the averment of different wrongs and causes of action, but merely the statement of the relations of the negligent person to the defendant." The gravamen of the count is the injury resulting from plaintiff having conformed to an order given by an employee of the defendant to whose orders plaintiff was bound to conform. The first insistence is, therefore, without merit. *Southern Car & Foundry Co. v. Bartlett*, 137 Ala. 234, 34 South. 20. It has been determined by this court that, in a count based on subdivision 3 of section 1749, the order given and conformed to shall be averred,

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and it should also be averred that the order was negligently given. *Bear Creek Mill Co. v. Parker*, 134 Ala. 301, 32 South. 700; *Southern Car Co. v. Bartlett*, 137 Ala. 234, 34 South. 20; *Dantzler v. Debardeleben Coal & Iron Co.*, 101 Ala. 309, 14 South. 10, 22 L. R. A. 361. Count 2 fails in these respects, and the demurrer should have been sustained, as without the averments mentioned the count fails to state a cause of action. *Cases supra*.

The fourth count as last amended is based on subdivision 5 of section 1749 of the Code of 1896, which provides for recovery of damages sustained by personal injury, "when such injury is caused by reason of the negligence of any person in the service or employment of the master or employer who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway." The count avers that the injury "was caused by reason of the negligence of Frank Driesbach, the engineer employed by the defendant to operate said train, while so engaged in the operation thereof." It is insisted that the count fails to aver that the engineer, Driesbach, had "charge or control" of the train. It is argued that the expression "engaged in the operation thereof," used in the count, is not the equivalent of the statement that Driesbach had the "charge or control" of the train. While it would have been more direct pleading to have averred that Driesbach was in charge or control of the train, yet we think that is the only deduction to be drawn from the averments employed in the count, and the demurrer was properly overruled.

There are many pleas to the different counts of the complaint, but, following our rule with reference to omission by appellant's counsel to insist on errors assigned, we will only consider the rulings of the court on the demurrers to pleas numbered 4 and 5 and plea B. It cannot be said as a conclusion of law that under all circumstances it is negligence for an employee, a brakeman, to dismount from a moving train and attempt to get upon the locomotive propelling the train, even though the act of dismounting should be unnecessary. Plea 4 fails to set out facts which on their face show contributory negligence on the part of the plaintiff, and the demurrer was properly sustained. *Birmingham Ry. & Elec. Co. v. Brannon*, 132 Ala. 431, 31 South. 523; *Watkins v. Birmingham Ry. & Elec. Co.*, 120 Ala. 152, 24 South. 392, 43 L. R. A. 297; *Osborne v. Ala. Steel & Wire Co.*, 135 Ala. 571, 33 South. 687.

The fifth plea is not subject to the demurrer assigned to it, and the court improperly sustained the demurrer. But issue was joined on pleas 3 and "d," and it is insisted for the appellee that these pleas set up the same, or substantially the same, defense as is set up by plea 5, and that under them the appellant could have had full benefit of the defense set up by plea 5. We are clear in our conclusion that the insistence is not tenable with respect to plea 3. Plea "d" avers "that the plaintiff negligently

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placed his foot upon the railroad track of the defendant immediately in front of the wheels of the locomotive being operated thereon, and thereby suffered the injury complained of." If the plaintiff put his foot on the ground, so that it was in front of the wheels of the locomotive, as is averred in plea 5, his foot was on the track of the road, and proof that he did so place his foot would have been competent evidence under plea "d." In other words, it cannot be said that the rails of a railroad of themselves constitute the track, irrespective of the ground between the rails and between the ends of the cross-ties. Therefore we are of the opinion that the defendant, under plea "d," was entitled to prove the defense as set up by plea 5, and the action of the court in sustaining the demurrer to plea 5 is error without injury.

Plea B is in this language: "That plaintiff contributed proximately to the injury complained of, in that he negligently attempted to get upon the locomotive of defendant while the same was in motion." "To withstand an appropriate demurrer, the plea of contributory negligence must go beyond averring negligence as a conclusion, and must aver a state of facts to which the law attaches that conclusion." *Osborne v. Ala. Steel & Wire Co.*, 135 Ala. 571, 33 South. 687. The expression in the plea "that he negligently attempted" is but the conclusion of the pleader, and the facts averred in connection with it are not such as the law attaches the conclusion of negligence to. The demurrer was properly sustained to plea B.

Issue was joined on the general issue, and special pleas 3, "c," "d," "i," and "k." At the time the plaintiff received the injury complained of, he was a brakeman in the employ of the defendant on a log train of the defendant, which consisted of a small-g geared locomotive and two skeleton cars loaded with saw logs. The two cars were in front of and were being pushed by the locomotive. This train was used for the purpose of carrying cars over the spur tracks to and from the main line and making up trains. Frank Driesbach was the engineer in charge of the train. Driesbach had control of the train and the plaintiff. The fireman was James Gaillard, who died before the trial of the case. The engine had no apparatus attached to it for sanding the track, but a bucket of sand was kept on the board or platform extending around both sides of the boiler. As described by one of the witnesses, this board or framework around the boiler made it appear as though the boiler was set into a flat car, and was called by the witnesses the "sanding board" or "running board." It extended across the front of the engine, and from 6 to 8 inches above the rail. There was suspended by iron stirrups another board, about 10 inches wide, extending from 10 to 12 inches outside of the rail at each end, known as the "foot board." Whenever the engineer desired the track to be sanded, he would cause the brakeman to sit upon the sanding board at the front of the engine, and with his hand throw or

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sprinkle sand on the rail. As to when and how the brakeman would be caused to take such position there is some conflict in the evidence. Instead of the cars having vertical brake rods, the same were attached horizontally to the end of the car, one end reaching near the center of the car, at which place the brake chain was attached to it, and the other end extending to the outside of the car, where there was an appliance for turning this brake rod and thereby tightening the brakes by using a ratchet fixed there and an implement called a "flunkey," which, from the description given of it, appears to be a large wrench. To apply or release the brakes, the train had to stop. The plaintiff had been employed as a regular brakeman on this road for about a month before the accident. His job prior to that time had been that of trackman on the same road for more than a year. During this period he had served frequently as an extra trainman. He was injured on the 2d day of April, 1904, and immediately before his injury he was riding upon one of the cars of logs which was being pushed by the locomotive. The train at the time was descending a long grade. While the train was in motion, the plaintiff left the car, got on the ground, and waited until the engine came opposite to where he was standing, and he attempted to get on the engine. His foot slipped under the wheel and was cut off across the instep. There were a number of signals, understood amongst the trainmen operating the road. One of these signals was several quick, short blasts from the whistle of the locomotive, which indicated that the brakeman should pay attention to and heed the engineer.

Concerning the facts above recited there is no dispute in the evidence. In addition to the undisputed facts, the plaintiff, who was the only witness in his own behalf, testified that on the morning of the accident, when they were about 150 feet from the bottom of the grade, the engineer gave the signal of two or three short blasts of the whistle, and when plaintiff looked back the engineer gave him the same sign that he always gave him to put sand on the track, and the plaintiff then got off the train, and went back to where the sand was, and took hold of the rod of the running board, and his foot slipped between the footboard and the tender trucks, under the engine, and was cut off. He testified the train was running downgrade, and it did not look "anyways" too dangerous to catch it, and it seemed that it needed sand by getting at the steepest part of the grade; that such was the reason that he made back at the time; that it didn't look "overly fast" —not too fast to catch. He testified, on cross-examination, that he did not know positively how fast the train was going at the time, but to his judgment about eight miles an hour; that it was noways too fast or dangerous for him to catch it at the time. He also testified that, when he looked back to the engineer, the sign which the engineer gave him was by pointing his finger forward and downward, and then it was he got off the train, that being the sign the engineer usually gave him to sand the track, and at that time the train



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was 150 feet from the bottom of the grade and was running in an "ordinary sort of way"; that the track was wet, and none of the brakes were on. The foregoing evidence has been carefully and attentively considered. It is the only evidence in the case that the plaintiff can rely on for recovery.

The burden rested upon the plaintiff to prove to the reasonable satisfaction of the jury that the negligence charged was the direct and immediate efficient cause of his injury. As was said in *Western Ry. of Ala. v. Mutch*, 97 Ala. 196, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179, quoting from 16 Am. & Eng. Ency. Law, p. 436: "To constitute actionable negligence, there must be not only causal connection between the negligence complained of and the injury suffered, but the connection must be by natural and unbroken sequence—without intervening efficient causes—so that, but for the negligence of the defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate—that is, the direct and immediate—efficient cause of the injury." *Decatur Car Wheel Co. v. Me-haffey*, 128 Ala. 242, 29 South. 646; *L. & N. R. R. Co. v. Quick*, 125 Ala. 561, 28 South. 14; *Reiter-Conley Mfg. Co. v. Hamlin* (Ala.) 40 South. 288; *Richards v. Sloss-Sheffield Steel & Iron Co.* (Ala.) 41 South. 288. There is nothing in the evidence to show or justify the inference that the giving of the alleged order by Driesbach was the proximate cause of the injury complained of. We have seen the plaintiff testified that he "lay hold" of the rod on the running board, and his foot slipped between the footboard and the tender trucks, under the engine, and was cut off. And this is all there is in the evidence tending to show how the accident came about, its causes, etc. There is no explanation at all as to what caused his foot to slip, or why it slipped. The slipping of the foot could not be referred to the order, or to the speed of the train; for there is no evidence that the movement of the train had anything to do with causing his foot to slip. Furthermore, plaintiff testified that the train was not going at such rate of speed as to make it dangerous for him to board the same; and he had frequently boarded the locomotive and sanded the track before. If this be true, how can it be said that the order given to sand the track was negligently given? On the other hand, if it was dangerous to board the locomotive, moving at the rate it was, certainly the danger was open and obvious, and there is no pretense that the plaintiff was incapable of recognizing and appreciating such danger as is incident to climbing or attempting to climb upon a moving locomotive. Climbing on the locomotive to reach the position for sanding the track was shown by the evidence to be a part of and within the duties of his employment, and the dangers attendant thereupon were natural and incidental to the business itself, and the master owes him no duty as to these risks. The servant assumed them.

So upon the evidence our conclusion is that the plaintiff failed to make a case for recovery under any count of the complaint,



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and the defendant was entitled to have given to the jury the general affirmative charge with hypothesis, as was requested by it. The foregoing conclusion renders it unnecessary for us to consider other assignments of error relating to the refusal of charges requested by the defendant and charges given for the plaintiff. It is also unnecessary to consider the numerous assignments relating to the rulings of the court on the admissibility of evidence. We make no comments on the assignment which presents for review the action of the court in requesting plaintiff's counsel to "draft a charge such as he thought would be appropriate to the case as made by the pleadings and evidence." But, in adopting this course, we must not be understood as approving the action of the court in that respect.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

## DENVER &amp; R. G. R. Co. v. SPORLEDER.

(Supreme Court of Colorado, March 4, 1907.)

[89 Pac. Rep. 55.]

**Master and Servant—Injuries to Servant—Defective Tools.\*—**

Where plaintiff refused to use the tools which were furnished by his employer, and chose to use those of his own choice, his employer was not liable for injuries sustained by the chipping thereof.

**Same—Warning of Danger.†—**Plaintiff, a man of ordinary intelligence, had been working as a carpenter for about 12 years on different railroads and other works of construction, and he was directed by defendant to chip off certain stone window seats, and was injured by a piece of steel flying from his tools into his eye. Held, that plaintiff was as competent to determine the danger of such injury as his employer, and that the latter therefore was not negligent in failing to warn plaintiff thereof.

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\*For the authorities in this series on the question whether the master is liable for injuries to employees resulting from their selection and use of improper appliances, or failure to use appliances where proper appliances have been furnished, see foot-notes appended to *Fewell v. Southern Ry. Co.* (Va.), 19 R. R. R. 677, 42 Am. & Eng. R. Cas., N. S., 677.

†For the authorities in this series on the subject of the duty to warn and instruct employees, see foot-notes appended to *Denver & G. R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361; foot-notes appended to *Richards v. Sloss-Sheffield Steel & Iron Co.* (Ala.), 21 R. R. R. 36, 44 Am. & Eng. R. Cas., N. S., 36; *Chicago, etc., Ry. Co. v. Riley* (C. C. A.), 20 R. R. R. 403, 43 Am. & Eng. R. Cas., N. S., 403; foot-notes appended to *Western Ry. v. Russell* (Ala.), 20 R. R. R. 225, 43 Am. & Eng. R. Cas., N. S., 225.

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**Same—Assumed Risk.†**—Plaintiff, a carpenter, was directed to trim off certain stone window seats, and, after working at such employment for two or three days, resumed his carpenter work for a time when he returned to the work of cutting stone, and was injured by a piece of steel flying into his eye. Held, that plaintiff having continued to work with knowledge of the dangerous character of the employment, without making any protest, assumed the risk.

**Same—Safe Tools.\***—Where plaintiff discarded the tools furnished him by defendant, not because they were unsafe, but because they were not handy, and did not request defendant to furnish other tools, but procured tools which seemed to him to be more convenient by which he was subsequently injured, he was not entitled to claim that defendant was negligent in failing to furnish him with safe tools.

Appeal from District Court, El Paso County; Louis W. Cunningham, Judge.

Action by Michael Sporleder against the Denver & Rio Grande Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

*Wolcott, Vaile, & Waterman, E. N. Clark, and McAllister & Gandy*, for appellant.

*McKesson & Little*, for appellee.

BAILEY, J. In the early part of August, 1901, plaintiff applied to the construction foreman of defendant for a position to do carpenter work. He was employed, and, at the time of his employment, was informed by the foreman that he might be required to do some other work than carpentering in connection with the bridge and building construction. He was put to work on the baggage room of defendant's depot in Colorado Springs, which was then in course of construction. It appears that the walls of this building were constructed of stone, and that the stone masons had prepared the openings which were to be used

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†For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to *Kennedy v. Kansas City, etc., R. Co. (Mo.)*, 21 R. R. R. 818, 44 Am. & Eng. R. Cas., N. S., 818; foot-notes appended to *Graham v. Chicago, etc., R. Co. (Tex.)*, 21 R. R. R. 549, 44 Am. & Eng. R. Cas., N. S., 549; *Farney v. Oregon Short Line R. Co. (Utah)*, 21 R. R. R. 529, 44 Am. & Eng. R. Cas., N. S., 529; foot-notes appended to *Anderson v. Northern Pac. Ry. Co. (Mont.)*, 21 R. R. R. 23, 44 Am. & Eng. R. Cas., N. S., 23; foot-notes appended to *Mumford v. Chicago, etc., Ry. Co. (Iowa)*, 20 R. R. R. 431, 43 Am. & Eng. R. Cas., N. S., 431; foot-notes appended to *Ives v. Wisconsin Cent. Ry. Co. (Wis.)*, 20 R. R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393; foot-notes appended to *Western Ry. v. Russell (Ala.)*, 20 R. R. R. 225, 43 Am. & Eng. R. Cas., N. S., 225; *Root v. Kansas City So. Ry. Co. (Mo.)*, 20 R. R. R. 171, 43 Am. & Eng. R. Cas., N. S., 171; foot-notes appended to *Drake v. San Antonio & A. P. Ry. Co. (Tex.)*, 20 R. R. R. 157, 43 Am. & Eng. R. Cas., N. S., 157; foot-notes appended to *Wagner v. Boston Elev. Ry. Co. (Mass.)*, 19 R. R. R. 187, 42 Am. & Eng. R. Cas., N. S., 187.

\*See foot-note on preceding page.

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as windows for window jambs eight inches in width, while the jambs which had been prepared for that purpose were nine inches in width, so that it became necessary to trim off the stone so as to admit of the fitting of the nine-inch jambs. Plaintiff was directed to do this work. He testified that when he was so directed: "At that time, I told him, 'Pshaw, any of the rest of the carpenters can do this just as well as myself; I am no stonecutter.' He [Mr. Eastman, who had given the order] said, 'I know it is outside of your line, but Mr. Snyder [the foreman] thinks you can do it.' I told him besides that, 'I haven't got a mortar digging chisel,' and he says he will have one made for digging out mortar. \* \* \* There was nothing said about my knowing anything about that kind of business \* \* \* I says, 'Well, if Snyder wants me to I guess I will have to,' and I went to work." Plaintiff was furnished with a chisel called a "mortar digging chisel," with which to remove the mortar between the layers of stone, and with some other chisels and points, and a large copper mallet or hammer, with which to do the work. After working a while, he complained that the copper hammer was too heavy, and Mr. Eastman, who seemed to be a sort of a subforeman, told him to get one to suit himself. He then procured from a secondhand store a steel hammer and some chisels which he considered suitable for the work. After working two of three days at this stonework, he ceased for a couple of days, and returned to the doing of some carpenter work, and then again, upon the request of the company, began working on the stonework, and, while so engaged, a piece of steel either from the chisel which he was using or from the hammer struck him in the eye, with the final result that the eyeball had to be removed. Plaintiff then brought this action against defendant, and in his complaint alleged that he was employed as a carpenter, and that his duty was to do ordinary carpenter work; that defendant's superintendent wrongfully ordered and directed him to quit his work as a carpenter and begin to work as a stonecutter; that plaintiff protested against said change of occupation, but that, in obedience to the persistent orders of defendant's superintendent, he began cutting the stone as directed, and that defendant did not furnish him with safe and proper tools with which to cut stone, but furnished him with defective, dangerous, and insufficient tools, chisels, and hammers, none of which could be safely used in cutting stone; that the chisels furnished plaintiff were brittle and easily chipped; that one of the chisels furnished by defendant and which was then being used by plaintiff in cutting stone for defendant broke, and a piece thereof flew and struck plaintiff in the right eye, causing the injury; that plaintiff did not know of the defective and dangerous condition of the tools and chisels, and that defendant failed to warn plaintiff of the dangers incident to the work of stonecutting. Defendant filed a general denial, and alleged as affirmative defenses contributory negligence and assumption of risk.

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The proof does not show positively whether the chisel plaintiff was using at the time of the accident was furnished by plaintiff or defendant, neither does it show whether the piece of steel which lodged in plaintiff's eye came from the hammer or from the chisel. The plaintiff introduced much testimony to show that the trimming of the stone was not work such as should ordinarily be performed by a carpenter, but that it was work that should be performed by a stonecutter. He also introduced testimony to show that the hammer was not at all suitable for that character of work, and that some of the chisels were not suitable, while others were suitable. It does not appear from the testimony that the chisels furnished by the defendant were not suitable. It does not appear from the testimony that the hammer furnished by the defendant was not suitable. It appears positively that the hammer that was used was the one furnished by the plaintiff himself, and which the stonecutters who testified said was an improper tool, because it was too light and because the surface of the striking part was broken and irregular, the handle was crooked, and it had various defects which would render it an improper tool. It also appears, and is not contradicted, that the hammer furnished by the defendant being copper would be much less apt to cause a sliver of steel to fly from the chisel than the steel-faced hammer would, because the copper is a softer metal. At the close of the testimony, the defendant requested the court to instruct the jury to return a verdict for the defendant. This request was refused, and, we think, erroneously, first, because the testimony of Mr. Snyder, the foreman who employed plaintiff, which is not denied, is that he informed plaintiff at the time of the employment that he might be called upon to do other work than carpenter work. That at the time plaintiff was requested to do this work, while he stated that he was not a stonecutter, his protest was made upon the ground that any of the other carpenters could do the work as well as he could, and not that it was work which he was not employed to do. Plaintiff refused to use the tools which were furnished by defendant, and chose, rather, to use those of his own choice, and if he made an improper choice, it is his misfortune, for which the defendant cannot be held accountable.

The plaintiff was apparently a man of ordinary intelligence. He had been working as a carpenter for about 12 years. He had worked as a carpenter upon different railroads, and upon other works of construction, and with his experience as a builder he could as easily determine that there was danger of being struck by flying pieces of steel or stone as the employer; and the employer was not guilty of negligence in failing to warn him of this danger. Again, having worked in cutting stone for two or three days previous to the time he was injured, and then changing his labor to that of a carpenter for several days, when he returned to the work of cutting stone he had actual knowledge of the danger which might exist from flying pieces of steel or stone, and having continued to work with knowledge of the

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dangerous character of the employment, and without making protest, he assumed the risk. *Cripple Creek Sampling & Ore Co. v. Souza* (Colo.) 86 Pac. 1005. The servant assumes the obvious risks arising from the condition of affairs, and where he possesses ordinary intelligence and ability and experience, the master is not obliged to warn him of an obvious danger whenever it be known to the servant, or could have been ascertained by him in the exercise of ordinary care. *Dresser's Employers' Liability*, p. 95; *DeLeon & Moon, Law of Liability*, p. 107. Plaintiff is in no position to contend that the defendant was negligent in failing to furnish him with safe tools, because the proof shows that the plaintiff discarded the tools furnished by defendant, not because they were unsafe, but because they were not handy, and, without requesting the employer to furnish other tools, he procured some which seemed to him to be more convenient. Being injured by the use of tools which he thus supplied for himself, of course he cannot complain of the master if such tools were unsuitable and unsafe. In the undisputed testimony, there is no theory upon which the defendant can be held liable for the misfortune of the plaintiff.

The judgment of the district court will therefore be reversed, and the cause remanded, with instructions to dismiss the complaint.

Reversed and remanded.

STEELE, C. J., and GODDARD, J., concur.

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**ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. BRISCO.**

(Supreme Court of Texas, Feb. 20, 1907.)

[99 S. W. Rep. 1020.]

**Master and Servant—Master's Liability Risks Assumed by Servant—Knowledge of Danger.\***—Plaintiff, who was injured by a hand car while helping co-laborers shove it upon the main track with unnecessary force, in order to avoid lifting it over the first rail, assumed the risk incident to the use of such unnecessary force, if that was the customary manner of doing the work, and plaintiff had full knowledge of that fact.

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Roland Brisco against the St. Louis Southwestern Railway Company of Texas. From a judgment for defendant, plaintiff appealed to the Circuit Court of Civil Appeals, which certifies certain questions to the Supreme Court.

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\*See preceding case, and foot-notes.

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*E. B. Perkins and Templeton, Crosby & Dinsmore*, for appellant.

*C. E. Sheppard*, for appellee.

BROWN, J. This is a certified question from the Court of Civil Appeals of the Fifth Supreme Judicial District. The statement and questions are as follows:

"In the above-entitled cause the following issues of law arise, which this court deems it advisable to present to the Supreme Court of the state of Texas for adjudication.

"Statement.

"Roland Brisco instituted this suit against the appellant railway company to recover damages on account of personal injuries alleged to have been received by him through the negligence of appellant's employees while working as a section hand in assisting to remove a hand car from the toolhouse and place it on the track. The railway company plead the general issue, contributory negligence, and assumed risk. Upon a trial, verdict and judgment were rendered for appellee, and the railway company appeals. The appellee's theory of recovery was negligence of employees in shoving the hand car with more force than usual, which caused it to run upon and injure appellee, who was pulling it; while that of the railway company was that the car was being moved in the usual manner, and the appellee assumed the risk of its being so moved. Plaintiff alleged that in obedience to said command of said foreman, and in compliance with their duty, plaintiff and his said co-laborers undertook to so remove said hand car from said toolhouse and place the same upon the main line; that in so doing plaintiff and Randolph Newsome took hold of said hand car in front or toward the main line, and Robert Booze and two or three of the other hands took hold of the same at the rear or behind the car from the main line; that in so taking hold of said car it was the duty of the other hands to push the same forward onto the track. Plaintiff represents that he used due care in management of said car at said time, but that unexpectedly to him, and without any warning whatever, some of the parties who were pushing said car from behind gave the same an unusual, quick, and violent push and shove forward toward this plaintiff; that he had at said time hold of said car, pulling backward on the same, as above alleged, and as it was his duty to do, and that, when said violent push was made, said hand car was suddenly and violently propelled against him with great and unnecessary speed, and without warning, and before he could get out of the way or do anything to avoid it, the said hand car was run violently and with great force against him, striking his leg, ankle, and hip, pushing him backward and throwing him violently to the ground, and running over his leg and ankle; that in being so pushed backward, and being so struck by said car, he stepped with his left foot between said guard rail and the main line of said track in trying to get out of the way of said car, and got



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his said foot caught between said rails and so fastened that he could not extricate it, owing to said car being propelled over and against him, as aforesaid; that after he so got his foot caught as aforesaid said parties pushing said car, or some of them, continued to violently shove and push the same, thereby injuring him as hereafter alleged; that said parties who pushed said car over and against him as aforesaid did so negligently and without care as to plaintiff's safety, and that it was not at all necessary nor usual to do so for the purpose of putting said car upon the track, and that there were sufficient hands hold of said car to have easily put the same upon the track without injury to any one by the use of ordinary care.'

"These allegations were substantially testified to by plaintiff's witnesses. It was shown that plaintiff had had some experience in handling hand cars, had for five or six years worked as a section hand, and knew there was danger of getting hurt in standing at the end of the car when they would shove it. New-some testified that he took hold of the car at the end fronting towards the railroad track. Plaintiff also took hold of the same place, and the other hands took hold at the other end. That was the way they had been pulling the car on the track. On the morning plaintiff was hurt 'we were putting the car on as we usually did, only the men at the back end shoved it harder than they had been doing.' They came out of the car-house shoving it pretty fast. It was shown that Booze stated, 'I was aiming to put the damn thing on or put it in the ditch.' Lum Kay testified, in effect: 'That they usually put the car in the toolhouse at night and would take it out of a morning. In putting it on the track, they usually shoved it fast so as to get over the rail of the main track. 'We shoved the car fast that morning, just like we did at all other times. We handled the car in putting it off and on twice a day, and sometimes oftener. We gave the car a hard shove that morning. I could not tell any difference in the shove before we got to it and after we got to it. I said we shoved it hard all the time. I gave the car a grown man's shove. I gave it a grown man's shove every morning. I did so that morning and all the other mornings. I did not want to push the car over there and hurt the plaintiff.' Boyd testified: 'I was pushing the car with the other hands. In taking the car from the house onto the track, we have to move it fast in order to get it over the first rail on the main track. They were moving the car pretty fast that morning, about like they always put it on. I only gave the car the shove as I usually did.' Holliday, foreman, testified: 'In taking the car from the house and putting it on the track, they usually shoved it in order to make it jump the first rail. The object in shoving the car is to make it go over the first rail. When the tools are on it, it is usually heavy, and they usually shove it pretty hard over the first rail.' Reed testified: 'We shove the car hard to make it go over the first rail, in order to keep from lifting it. Do not remember whether the car was going faster than

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usual or not that morning. My recollection was that it was going about as usual. If it was going any faster, I was not paying any attention to it.'

"The court, in affirmatively presenting plaintiff's case, and after stating that if in pushing the car the co-laborers 'gave the same an unusual, quick, and sudden push and shove forward,' etc., further charged, 'And if you believe that it was not necessary or usual to so push said hand car in order to get the same on the track.' \* \* \* to find for plaintiff. The court also charged on contributory negligence and assumed risk as follows: 'But if you believe from the evidence that plaintiff voluntarily and unnecessarily placed himself near the frog or guard rail where he was injured, if he was injured, and in a position where his foot was liable to be caught therein, or if you believe that plaintiff voluntarily and unnecessarily got in front of said car as it was being rolled from the toolhouse to the track, and carelessly caught at or caught hold of the car, and if you believe in doing all of said things, or either of them, if he did, he failed to exercise ordinary care, as that term is above defined, and was guilty of negligence which caused or contributed to cause the injuries sustained by him, if any, then you will find for defendant. \* \* \* You are further instructed herein that plaintiff in accepting and remaining in the employment of defendant as such a hand thereby assumed all ordinary risks and dangers incident to the work in which he was engaged at the time he was injured, if he was injured, but that he did not thereby assume such risks and dangers as might result from the negligence of his fellow servants and co-employees while so engaged in said work, and if you believe that plaintiff was injured in his ankle and knee as alleged, and that his said injuries, if any, were a result of the dangers, if any, ordinarily incident to removing the hand car out of the toolhouse and rolling the same over the wooden track leading from the toolhouse to the track of defendant, at the place and under the circumstances that he and the other section hands did, then you will find for the defendant; but, if you believe that said injuries to plaintiff, if any, were the result of the negligence of any of the employees of the defendant engaged in helping him remove said car from the toolhouse, and roll the same to and upon the track as alleged, if they did, you will find for the plaintiff under the instructions hereinbefore given you.'

"The railway company asked a special charge, which was refused by the court, as follows: 'If you believe from the evidence that plaintiff was injured at the time and place and in the manner charged in the petition, and if you further believe that plaintiff's said injuries were caused by the rapid movement of the hand car from the toolhouse to the railway track at a point on the railway track where there was a switch and a guard rail or rails, and if you further believe that it was negligence, as that term has been defined to you, in the section hands to move the said hand car from the toolhouse to the railway

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track at that place with the speed it was moved, and if you further believe from the evidence that at the time the plaintiff was injured he was an experienced section hand, and knew, or might have known by the use of ordinary care, the risk and danger of moving the said hand car in the manner it was moved, and if you further believe that the said hand car at that time was moved by the section hands in the manner which theretofore had been usual and customary with them, and if you believe that plaintiff at the time knew the ordinary manner and custom of the section hands theretofore in moving the said hand car from the toolhouse to the railway track, then plaintiff assumed all risk to himself of injuries by reason of the manner of moving the said car at that place, and defendant is not liable to plaintiff for any injuries received by him, and you will find for the defendant.'

"The members of this court are divided as to whether the evidence requires the giving of the special charge requested, and whether or not the principle announced in *Railway v. Huyett* (Tex. Sup.) 92 S. W. 454, relating to assumed risk of customs, etc., of employees, or that of *Railway v. Turner* (Tex. Sup.) 91 S. W. 562, applies, and have thought it best to certify the following questions for your decision:

"Question 1. In view of the evidence and the charge of the court, was the defendant entitled to the requested charge, and should it have been given?

"Question 2. Does an employee connected with a particular work assume the risk of dangers arising from the usual and customary negligent manner of the doing of such work by his co-employees, when he is experienced in such work and knows, or must necessarily have known, of the usual and customary manner of doing said work?"

We answer both questions as follows: The court erred in not giving the charge set out in the statement submitted. There was evidence from which the jury might have found that the hand car was uniformly placed upon the track by giving it a hard push to get it over the first rail of the track: This was the method of doing the work, and they might also have found that Brisco was daily engaged in assisting them put the car on the track as he was engaged on that occasion, and knew of the manner in which his fellow servants uniformly performed that work. The jury might have found that the car on this occasion was shoved as it usually was, and with no more force. The evidence is conflicting upon these issues; but the jury might have concluded that Brisco assumed the risk of putting the car on the track in the manner in which it was done. *Railway Co. v. Bradford*, 66 Tex. 732, 2 S. W. 595, 59 Am. Rep. 639; *Lynch v. Railway Co.*, 159 Mass. 536, 34 N. E. 1072; *Hunt v. Kile*, 98 Fed. 49, 38 C. C. A. 641; *Red River Line v. Cheatham*, 60 Fed. 517, 9 C. C. A. 124; *G., C. & S. F. Ry. Co. v. Harriett*, 80 Tex. 73, 15 S. W. 556.

One who is engaged in the performance of work in a manner

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well known to him must be held to assume the risks of danger which are involved in the performance of the work in that way. There was no conflict in the testimony as to the fact that Brisco had been engaged in performing this character of work—that is, putting the car upon the track for some time—that he was experienced, and had full knowledge as to the method in which the work was done. He was participating in the work on this occasion, and the facts bring it within the rule laid down by this court in *G., C. & S. F. Ry. Co. v. Huyett* (Tex. Sup.) 92 S. W. 454.

The difference between the case at bar and the case of *Railway Co. v. Turner* (Tex. Sup.) 91 S. W. 562, is that in the Turner Case the injured party was not engaged in the work of switching the cars from which the injury occurred to him, but was engaged in a wholly independent business. He was not in a position to know at the time that the cars were being switched, as usual, in an unsafe and negligent way. The question of the assumption of risk depends largely upon the position of the party who is to be charged with such assumption with regard to his opportunity for knowing that at that time the thing to be done will be performed in the usual manner. If, knowing the usual method of doing the work and that it will be performed in that way, he participates in it, he will be held to assume the risk.

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**DUNBAR v. CENTRAL VERMONT R. CO.**

(Supreme Court of Vermont, Jan. 10, 1907.)

[65 Atl. Rep. 528.]

**Master and Servant—Injury to Servant—Assumption of Risks.\*—**

The risk of injury to a conductor by a derailment of his train in consequence of the unsoundness of the ties is an extraordinary risk existing by fault of the railroad, and is not assumed by the conductor unless he knows and comprehends the defects or the same are so plainly observable that he will be taken to have known and comprehended them.

**Same—Burden of Proof.†—**A conductor suing for injuries caused by the derailment of his train, occasioned by the unsoundness of the

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\*For the authorities in this series on the question whether trainmen assume the risks from defective track conditions, see foot-notes appended to *McCabe & Steen Const. Co. v. Wilson* (Okla.), 21 R. R. R. 596, 44 Am. & Eng. R. Cas., N. S., 596.

For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see preceding case, and foot-note.

†For the authorities in this series on the subject of the burden of proving assumption of risk by a railroad employee, see foot-note appended to *Chicago, etc., R. Co. v. Heerey* (Ill.), 9 R. R. R. 26, 32 Am. & Eng. R. Cas., N. S., 26.

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ties, has the burden of proving that he did not know and comprehend the danger resulting from the defective ties.

**Same—Evidence—Admissibility.**—Where, in an action for injuries to a conductor caused by the derailment of his train, it was alleged that the derailment was occasioned because the ties were so unsound that the spikes could not hold the rails in place under the pressure of the train, evidence that a large per cent. of derailments could not be accounted for nor guarded against was inadmissible as showing that derailments were ordinary risks of the business and assumed by the conductor.

**Trial—Evidence—Exclusion—Objections—Sufficiency.**—Where it did not appear what answer was expected to a question put to a witness, its exclusion did not show error.

**Master and Servant—Injury to Servant—Defective Appliances—Evidence—Admissibility.**†—In an action for injuries to a conductor caused by the derailment of his train, occasioned by the unsoundness of the ties, evidence of the condition of the roadbed as to ballast a year and a half after the accident was properly excluded where it did not appear that the condition of the roadbed was the same as at the time of the accident.

**Appeal—Rulings on Motion in Arrest—Exceptions—Necessity.**—The court will not review the overruling of a motion in arrest where no exception was taken to the ruling.

Exception from Franklin County Court; James M. Tyler, Judge.

Action by Henry A. Dunbar against the Central Vermont Railroad Company, for injuries received by plaintiff while conductor in charge of a train, in consequence of the derailment of the train. There was a verdict and judgment for plaintiff, and defendant excepts. Reversed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and MILES, JJ.

*Brigham & Start, Alfred A. Hall, and Senter & Senter*, for plaintiff.

*C. N. Witters and H. Henry Powers*, for defendant.

ROWELL, C. J. This is the case to recover for personal injuries to the plaintiff by the derailment of a passenger train that he was conducting over the defendant's railroad.

The declaration alleged, and plaintiff's evidence tended to show, that the derailment was occasioned because the ties were so unsound and insufficient that the spikes could not hold the rails in place under the pressure of the train in going around the curve where the accident happened. The defendant moved for a verdict, for that there was no evidence tending to show any negligence on the part of the defendant that the plaintiff did not know, or, from his long experience on the

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†See generally, extensive note, 19 R. R. R. 275, 42 Am. & Eng. R. Cas., N. S., 275.

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road, ought to have known. This raised the question of on whom was the burden of proof as to the assumption of risk. There was nothing in the case to show whether the plaintiff knew the condition of the road or not, save what might be inferred from the fact that he had recently run his train over it several times without accident. But the court took no note of that fact as ground for an inference either way, but though there was no evidence that the plaintiff knew of the defect, and therefore assumed that he did not know, and submitted the case accordingly, thereby casting the burden upon the defendant of showing assumption of risk, and relieving the plaintiff from the burden of showing nonassumption. But the risk was not an ordinary risk, existing without the fault of the defendant, and therefore assumed by the plaintiff, but an extraordinary risk, as it existed by the fault of the defendant, and therefore was not assumed by the plaintiff, unless he knew and comprehended it, or it was so plainly observable that he will be taken to have known and comprehended it, then, in either case, he cannot recover. *Dumas v. Stone*, 65 Vt. 442, 25 Atl. 1097; *Texas & Pacific Railway Co. v. Archibald*, 170 U. S. 665, 673, 18 Sup. Ct. 777, 42 L. Ed. 1788; *Choctaw, etc., R. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96. It will be noticed that the test is not whether the servant exercised care to discover the danger, for he is not bound to do that when he has a right to assume that it does not exist, but whether he knew and comprehended it, actually or presumably. Some of our cases in stating the test may involve the idea of care on the part of the servant, but generally when rightly understood, they state it with substantial accuracy, we think. Hence want of such knowledge and comprehension was an essential element of the plaintiff's case, and consequently the burden was on him to negative them, otherwise he would be taken to have assumed the risk, and could not recover. Such is the law of this state, and of some of the other states, though some hold the other way. In *Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758, the plaintiff was injured by the explosion of dynamite that the defendant, her master, had put into a hot stove oven in his house where she was at work, without informing her of its dangerous character, and because the declaration did not allege her ignorance of its dangerous character, it was held bad on demurrer. This is the rule of the common law. Thus, *Griffiths v. London & St. Katherine Docks Co.*, 13 Q. B. D. 259, in the Court of Appeals, was an action by the servant of the defendant for personal injuries resulting from the negligently unsafe condition of the premises whereon the servant was employed. Although the action was brought after the passage of the employers' liability act of 1880, it was not founded upon it. The declaration of claim alleged that one of the iron doors that formed part of the warehouses of the defendant's dock gave way and fell upon the plaintiff who was in the defendant's employment. It contained



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no allegation that the plaintiff was ignorant of the insecure condition of the door, nor of the danger to which he was exposed, but alleged only that the defendant knew, or ought to have known, of the defective, unsafe, and insecure condition of the door, and that it was altogether owing to the defendant's negligence that it was not put into a safe and secure condition. The declaration was held bad for not alleging want of knowledge on the part of the plaintiff. Brett, M. R., said that, if the danger is one that was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and, as it is necessary for these two things to exist in order to form a *prima facie* case, it is necessary that they should be shown to exist by the declaration. Bowen, L. J., said that the old form of declaration used to show that the danger that caused the accident was known to the master and unknown to the servant; that both of these allegations are necessary, because without them there is no cause of action; and that, unless it is shown at the trial, or there are facts from which it can be inferred that the servant was ignorant of the existence of the danger, he would be nonsuited. Fry, L. J., said that it appeared plain to him that the knowledge of the master and the ignorance of the servant are necessary to constitute a cause of action.

This statement of the substantive law of the case is sufficient to obviate the necessity of specifically considering the requests to charge that are relied upon, for they are directed in varying ways to substantially the same question.

The defendant claimed that the derailment could not be accounted for nor guarded against, and offered to show that a large per cent. of derailments are of that character, for the purpose of showing that they are ordinary risks of the business, and therefore assumed by the servant. But, as we have seen, the risk in question, as shown by the declaration and the plaintiff's evidence, was not an ordinary risk, but an extraordinary risk, and the plaintiff could not recover unless he showed that the accident happened substantially as alleged in the declaration. *Clark v. Employers' Liability Co.*, 72 Vt. 458, 467, 48 Atl. 639. Therefore the testimony was offered to show a thing not in issue, and properly excluded.

As it does not appear what answer was expected to the question put to the witness Walsh, its exclusion does not show error.

The question put to the witness Brown as to the condition of the roadbed as to ballast when he examined it a year and a half after the accident, was properly excluded, because it did not appear that its condition was the same.

The defendant moved in arrest, and insists that the declaration is bad for not alleging that the plaintiff was ignorant of the danger. But we cannot consider the motion, for it does not appear that any exception was taken to the overruling of it.

Judgment reversed, and cause remanded.

## CHOCTAW, O. &amp; G. R. CO. v. THOMPSON.

(Supreme Court of Arkansas, Feb. 11, 1907.)

[100 S. W. Rep. 83.]

**Master and Servant—Master's Liability for Injuries to Servant—Risks Assumed by Servant—Obvious Dangers.\***—Where an experienced brakeman enters the service of a railway company using unblocked frogs, and it is part of his duty to switch cars, he has necessarily an opportunity to observe the condition of the switches, and must be deemed to have assumed the risk of whatever danger there is from the use of unblocked frogs.

**Same—Knowledge of Danger.\***—The difference between blocked and unblocked frogs is, to an experienced brakeman familiar with switching trains, so obvious that he is charged with notice of the kind in use.

**Same—Duty to Discover Defects.\***—It is the duty of a servant to inform himself of the ordinary risks of his employment, and if he fails to do so he will still be held to have assumed them.

**Trial—Instructions—Submission of Matters Not within Issues—Duties—Negligence of Master.**—In an action for injuries, where it is shown that plaintiff assumed the risk of injury from the unblocked frogs in use, it was error to submit to the jury the question of defendant's negligence in failing to block the frog.

**Master and Servant—Contributory Negligence of Servant—Actions—Questions for Jury.**—Whether a brakeman assumed the risk, or was guilty of contributory negligence, in attempting to make a coupling with a defective apparatus, instead of crossing the track and using the lever on another car, was a question of fact for the jury.

**Same—Contributory Negligence—Acts in Emergency.†**—Where a brakeman making a coupling discovered, when the cars were only a short distance apart, that the coupling on the moving car was defective, so that he must make the coupling with his hand if he acted from that side, he cannot be held guilty of contributory negligence for not crossing the track and making the coupling with the lever of the standing car, unless he was fully aware of the danger, or it was so obvious that no ordinarily careful person would have attempted to make the coupling the way he did.

**Same—Questions for Jury.**—Whether it was negligence for a brakeman, because of a defective coupling apparatus, to go in between moving cars in order to couple them, was a question for the jury.

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\*See preceding case, and foot-notes.

†For the authorities in this series on the question, what is, and is not, contributory negligence on the part of employees engaged in coupling or uncoupling cars, see foot-notes appended to Southern Ry. Co. v. Simmons (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572.

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**Same.**—The fact that a brakeman was injured because of the way he selected for performing a duty, when, if he had selected another way, injury would have been avoided, does not conclusively show contributory negligence.

Appeal from Circuit Court, Logan County; Jephtha H. Evans, Judge.

Action by H. J. Thompson against the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and remanded.

*E. B. Peirce* and *Buzbee & Hicks*, for appellant.

*Randell & Wood* and *Wilkins, Beaty & Vinson*, for appellee.

MCCULLOCH, J. The plaintiff, H. J. Thompson, was employed as brakeman by the defendant, Choctaw, Oklahoma & Gulf Railroad Company, and instituted this action in the circuit court of Logan county to recover damages for injuries received while at work coupling cars for defendant in its yards at Oklahoma City, in Oklahoma Territory. His leg was run over and mashed, so that it became necessary to amputate it below the knee, and the jury returned a verdict in his favor, assessing his damages in the sum of \$6,000. His train (a work train) was made up in the yard for a trip, and he was directed by the conductor to bring the engine out of the roundhouse and couple it to the train. He proceeded to do this, and signaled the engineer to back up so as to couple the rear car to the front car of the main part of the train standing on the main track. He started back to the train for the purpose of opening the knuckle of the coupling on the end of the front car, when he was overtaken, in about 12 or 14 feet of the front car, by the end of the car attached to the backing engine; and he reached for the lever controlling the coupling on the moving car, but found there was no lever, and jumped in between the car to make the coupling. What occurred then can best be described in his own language, as follows: "I had to make two or three attempts to get this knuckle open. It was an old-fashioned Janhey coupler, and when I got it open we was near to the car. The pin had to be held up to make the coupling. If I had dropped it, it would have struck the other knuckle and closed and locked it. I had to hold this pin to make this coupling, and in doing so I caught my foot in an open frog." Before he could extricate his foot the wheels struck it. There was a lever on the standing car, on the side across the track, which could have been used in making the coupling; but plaintiff would have had to cross the track to reach it, and he testified that he could not have done so before the moving cars came against the other. The evidence, which on this subject is undisputed, establishes the fact that on appellant's road the frogs were all unblocked, and that, while on some railroads the frogs were blocked, it was rarely ever done. The plaintiff testified that he had never examined to see whether the frogs on appellant's road were kept blocked; that he was

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familiar with the switches, but never noticed whether or not the frogs were blocked. He had been working on appellant's road as brakeman for three months when the injury occurred, and had been in railroad service about three years, of which time he had been brakeman about ten months.

Negligence on the part of the defendant is alleged in failing to provide a lever on the car for use in coupling, and in failing to have blocked the frog where plaintiff was injured. The defendant asked the court to give an instruction to the jury telling them not to consider the alleged negligence of the defendant in failing to block the frog. The court refused to so instruct, but gave instructions submitting to the jury for their determination whether the defendant was guilty of negligence in failing to have the frog blocked, and whether or not the plaintiff had, under the circumstances, assumed the risk of danger from the use of unblocked frogs. Appellant assigns error of the court in this respect, and contends that according to the undisputed testimony the plaintiff should be held to have assumed the risk of such damages, and that the question should not have been submitted to the jury. It should be noted in the outset that there is no allegation of negligence on the part of defendant in failing to give warning or instruction to the plaintiff of the dangers of the service; nor does the proof sustain such a charge. The plaintiff was, at the time he entered the service of defendant company, a full-grown man of experience in the work in which he was about to engage. So there is, in this case, no element of inexperience on his part, or of the duty on the part of the defendant to warn or instruct him as to his work or the dangers incident thereto. We have the sole question whether a brakeman of experience, who enters the service of a railroad company using unblocked frogs, a part of whose duties it is to switch cars, and who has necessarily an opportunity to observe the condition of the switches, is deemed to have assumed the risk of whatever danger there is from the use of unblocked frogs. In the case of *Davis v. Railway*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283, where suit was brought to recover damages on account of the death of a youth of limited experience in railroad work while engaged in coupling cars, Chief Justice Cockrill, speaking for the court, said: "The question for the jury's consideration was not whether the railway company was guilty of negligence in failing to block the space between the main and guard rails, because, even if the failure to do that could, upon the evidence adduced, be found to constitute negligence (as to which see *Railway v. Lonergan*, 118 Ill. 45, 7 N. E. 55; *Rush v. Railway*, 36 Kan. 129, 12 Pac. 582; *Mayes v. Railway*, 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Huhn v. Railway*, 92 Mo. 440, 4 S. W. 937), the proof shows that the deceased continued in the service after he knew, or, what is the same thing, had full opportunity to know, that the rails were unblocked." And in *Railway Co. v. Davis*, 54 Ark. 389, 15 S. W. 895, the court, following the rule in the case just

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cited, held that an employee who took service with the railway company using unblocked frogs assumed the risk of the danger incident thereto, and could not recover by reason of the failure of the company to block the frogs. In disposing of the question the court said: "The plaintiff charges negligence in the use of unblocked frogs, not because they were badly constructed, out of repair, or exposed operatives to latent dangers, but because a different kind of frog would have been less dangerous to operatives. Unblocked frogs were in universal use on the roads in this state, including the entire road of the defendant. The injured employee knew when he entered the defendant's service that its frogs were unblocked; and, if there was danger in their use, he knew it was an incident to the service he was entering. When a master employs a servant to do a particular work with a particular kind of implement or machine, he agrees that they are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, but does not agree that they are free from danger in their use. The servant agrees to use in the service the particular kind of implement or machine; and if, under such circumstances, harm comes to him, it must be ranked among the risks he assumed when he entered the service."

It is argued, however, that the evidence in the case at bar does not show that the plaintiff, either when he took service or at the time he was injured, knew that unblocked frogs were in use on defendant's road. It is sufficient to say in reply to this that the difference between blocked and unblocked frogs is, to one engaged in switching trains, so obvious that he is charged with notice of the kind in use. *Davis v. Railway*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283. "A servant is not required to inspect the appliances of the business in which he is employed, to see whether or not there are latent defects that render their use more than ordinarily hazardous, but is only required to take notice of such defects or hazards as are obvious to the senses. The fact that he might have known of defects, or that he had the means and opportunity of knowing of them, will not preclude him from a recovery unless he did in fact know of them, or in the exercise of ordinary care ought to have known of them." *L. R. M. R. & T. Ry. Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230. This court has often held that an employee is bound to take notice of obvious defects in the place in which or instrumentalities with which he is put to work. *Fordyce v. Edwards*, 60 Ark. 438, 30 S. W. 758; *Fordyce v. Edwards*, 65 Ark. 98, 44 S. W. 1034. In the recent case of *Choctaw, Oklahoma & Gulf R. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, we said: "In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service, and where it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know

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the ordinary risks. It is his duty to inform himself of them, and, if he negligently fails to do so, he will still be held to have assumed them." To the same effect see *Cotton Oil Co. v. Spotts*, 77 Ark. 458, 92 S. W. 249; 1 Labatt, Master & Servant, §§ 388, 404; Dresser on Employer's Liability, §§ 92, 95; *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill. 365; *O'Neil v. Keyes*, 168 Mass. 517, 47 N. E. 416; *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Fulow v. Lake Shore & M. S. R. Co.*, 108 Mich. 690, 66 N. W. 593; *Ragon v. Railway Co.*, 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336; *Mayes v. C., R. I. & Pac. Ry. Co.*, 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573. The Supreme Court of Massachusetts, in discussing this subject, said: "When the plaintiff entered the defendant's service he impliedly agreed to assume all of the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. It is not material whether he examined the machinery before making the contract or not. He could look at it if he chose, or he could say: 'I do not care to examine it. I will agree to work in this mill, and I am willing to take any risk in regard to that.' In either case he would be held to contract with reference to the arrangement and kind of machinery then regularly in use by the employer, so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage." *Rooney v. Sewall & Day Cordage Co.*, *supra*. We are therefore of the opinion that the court erred in submitting to the jury the question of negligence on the part of the defendant in failing to block the frog. Under the facts established by the undisputed evidence, the plaintiff is deemed to have assumed the risk of that danger.

As the case must be tried again, we deem it proper to pass upon other questions raised, and which will arise again in the next trial. There was evidence to sustain the charge of negligence of the defendant in allowing the appliances for coupling cars to get out of repair, and it was a question for the jury to determine from all the proof whether or not the plaintiff assumed the risk by going between the cars to make the coupling after discovering the absence of the lever on the moving car. The instructions of the court on this branch of the case were, we think, correct.

Appellant assigns error of the court in refusing to give the following instruction, and other of like import: "If you find that the coupling apparatus of one of the cars which plaintiff attempted to couple was defective, but that the apparatus on the other car was in good order, and that, by using the apparatus on that car, plaintiff could have made the coupling without putting himself in a place of danger, then it was his duty to make said coupling in a safe way, and his failure to



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do so would be contributory negligence, which would bar his recovery in this case." The instruction was properly refused. It cannot be said as a matter of law, under the circumstances of this case, that the plaintiff was guilty of contributory negligence in attempting to use the defective apparatus on the moving car instead of crossing the track or stopping the train and using the apparatus on the other car. This was a question for the jury, and not one of law to be determined by the court. That the plaintiff attempted to make the coupling with the defective apparatus, instead of abandoning the effort or crossing the track and using the lever on the other car, was a fact for the consideration of the jury; but it cannot be said as a matter of law that by so doing he assumed the risk or was guilty of contributory negligence. When he discovered the absence of a lever on the moving car, he was confronted by an emergency which suddenly called for the exercise of his judgment, and before he can be said to have assumed the risk it must be found that he was aware of and appreciated the danger, and before he can be held guilty of contributory negligence it must appear that the danger was so obvious that a person of ordinary prudence and care would not have attempted to make the coupling in the way he did. *C., O. & G. Ry. Co. v. Jones*, 77 Ark. 367, 92 S. W. 249; *Southern Cotton Oil Co. v. Spotts*, 77 Ark. 458, 92 S. W. 249. It must be remembered that when plaintiff discovered the absence of the lever the cars were about 12 feet apart, and he had only a moment in which to choose what course to pursue. It was his duty to couple the cars together in accordance with the orders just given him by his superior. If he saw the lever on the other car, he necessarily had to act hastily in determining whether to go between the cars to make the coupling, cross the track between the cars so as to reach the lever on the other car, or let the cars come together without coupling. It is not negligence per se for a brakeman to go in between moving cars in order to couple them together. It is often necessary to do so. Whether it was negligence to do so under the circumstances shown in this case was a question to be determined by the jury. In *Railway v. Higgins*, 53 Ark. 458, 14 S. W. 653, in discussing the question of contributory negligence of a brakeman while coupling a car, the court said: "But, in determining whether he has failed to exercise due care in exposing himself to danger, it is always necessary to take into consideration the exigencies and circumstances under which he acted. If the service which he undertook to perform was required by a superior, and was such as to demand his exclusive attention, and that he should act with rapidity and promptness, it would be unreasonable to require of him that care, thought, and scrutiny which might be exacted when there is time for observation and deliberation. In emergencies, when such attention, rapidity, and promptness are demanded, it could hardly be expected that he would always call to mind previous information or knowledge that, if

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at the moment remembered, would have caused him to avoid the danger from which his injuries resulted. Under such circumstances the question of his due care would depend, to some extent, upon the view the jury might take of the necessity for immediate action, and the time he had for reflection or thought." *C., O. & G. R. Co. v. Craig* (Ark.) 95 S. W. 168; 1 Labatt on Mast. & Serv. § 333; *Tennessee Coal & Iron Co. v. Herndon*, 100 Ala. 451, 14 South. 287; *Alabama G. S. Co. v. Richie*, 99 Ala. 346, 12 South. 612. Counsel for appellant have cited in their brief cases holding to the contrary; but we are convinced that the rule we have announced is the correct one, and is sustained by the weight of authority.

Error is also assigned in the rulings of the court in admitting testimony concerning violation of the rules of the company by brakemen in coupling cars; but, inasmuch as that question is fully discussed in the recent case of *St. Louis, I. M. & S. Ry. Co. v. Caraway*, 77 Ark. 405, 91 S. W. 749, which will serve as a guide to the court when the case is tried again, we do not deem it necessary to enter upon another discussion of the question.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

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**SHANKS v. CENTRAL VERMONT R. CO.**

(Supreme Court of Vermont, Jan. 10, 1907.)

[65 Atl. Rep. 529.]

**Master and Servant—Death of Servant—Railroad Employees—Assumed Risk.\***—Where the death of plaintiff's intestate, a railroad employee, was caused by a defective rail, which existed independent of the dangers arising from a change in the gauge of the road, decedent did not assume the risk thereof by remaining in defendant's employ, unless he had either actual or imputed knowledge of the defect.

**Appeal—Prejudice—Confused Instructions.**—Where, in an action for death of an employee, the jury found that decedent was not guilty of contributory negligence and had had no knowledge of the risk, defendant was not harmed by the fact that the court in its instructions erroneously confounded contributory negligence and assumed risk.

Exceptions from Windham County Court; James M. Tyler, Judge.

Action by one Shanks, as administrator of Elmer W. Shattuck, against the Central Vermont Railroad Company. A verdict was rendered in favor of plaintiff, and defendant brings exceptions. Affirmed.

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\*See preceding case, and foot-notes.

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Argued before ROWELL, C. J., and MUNSON, WATSON, HAS-  
ELTON, POWERS, and MILES, JJ.

*Clarke C. Fitts*, for plaintiff.

*Hunton & Stickney*, for defendant.

ROWELL, C. J. This is an action upon the statute for the benefit of the widow and next of kin of the deceased, whose death is alleged to have been caused by the negligence of the defendant. The deceased was an engineer on the defendant's railroad, from Brattleboro to South Londondary. The road was originally a narrow gauge, but was changed to a standard guage in a single day by moving the rails on each side the requisite distance. This change required further work of the construction—replacing of ties, ballasting, etc. After the change, but before the work of construction was completed, the engine that the deceased was running slid from the roadbed, the roadbed and the rails slid down a bank, the engine was overturned, and the deceased thereby killed. The change was made the 31st of July, and the accident happened the 28th of August, and during that time the deceased's train was derailed many times to a greater or less extent, and once before on the day of the accident. The rails in the vicinity of the accident were of steel, but of iron at the point of accident, and of less weight. It appeared that an iron rail was broken at that point, and that a piece of it went through the ash pan, and up through the air drum, and struck against the tender, so as to bend it up at the end. Another piece of rail was found near by, which the testimony tended to show was broken from the piece that went through the ash pan. The testimony on the part of the plaintiff tended to show that some of the ties at the point of accident were too short, and badly decayed, especially at the ends.

The claims of the parties on trial can be best understood if stated in the words of the charge, thus: "There have been two theories argued to you by counsel on the respective sides. The plaintiff claims, and his counsel argues to you from the testimony and this piece of rail shown you here in court, that the primary cause of the accident was the breaking of this rail; that that let the engine down; and that, being down, it went down the bank, taking a portion of the roadbed with it. On the other hand, the defendant claims, and its counsel argue to you, that the more reasonable theory is that the roadbed itself was insufficient, so that, when this heavy engine came along over it at this particular point, the roadbed itself went down, without regard to any insufficiency of the ties or the rails, but that it was the roadbed that gave way. Now, if you should find that this was really the cause of the accident, that it was the sinking of the roadbed, and not the fault of the rails or the rails and the ties, then the plaintiff cannot recover, because he has not sued for any defect in the roadbed itself. I have already called your attention to that—that for the plaintiff to

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recover he must show that the defect was in the rails, or the rails and ties, or the tie itself, and that in consequence of this defect the engine went through and down the bank, and carried some of the roadbed with it. So I have called your attention to these two theories, and you must consider all the evidence bearing upon them, and say which in your judgment, is the correct one." And the plaintiff's claim was justified, both by his declaration and his evidence. By continuing in the service after the change of gauge, the deceased may have assumed the risk of dangers thereby created, as claimed by the defendant. But the danger here complained of was not thereby created, but existed independently of it, as the plaintiff's evidence tended to show; and therefore the case as presented is one of an extraordinary risk, because existing by the fault of the defendant, and therefore not assumed by the deceased unless he had knowledge of it, actual or imputed.

But the defendant says that in any view of the case the court confounded contributory negligence and assumption of risk. This may be so, if there is any difference between them, as some say there is, for they say that contributory negligence can arise only when there is negligence on the part of the defendant, in which case contributory negligence breaks the causal connection between the defendant's negligence and the injury complained of, and thus itself becomes the proximate cause of the injury, and defeats recovery; whereas assumption of risk negatives the existence of any duty on the part of the defendant by the breach of which he could be a wrongdoer.

But, be this as it may, the defendant was not harmed by the confusion, if any there was; for, under the charge, the jury must have negatived both contributory negligence and knowledge of the risk.

Judgment affirmed.

PRECODNICK *v.* LEHIGH VALLEY R. CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey, March 4, 1907.)

[65 Atl. Rep. 1047.]

**Master and Servant—Injury to Servant—Duty to Warn—Assumption of Risk.\***—The plaintiff's intestate was a track laborer in the employ of the defendant. While it was shown that it was part of the system, under which the men worked together as a gang upon the tracks, that the foreman should warn them of approaching danger, yet it appeared that it was the custom that, when one was working alone and separated from the rest of the gang, he should look out for his own safety. Deceased had been sent to a point to work 325 feet from the other men. He was run down by a train and killed. Held, that the defendant owed no duty to the deceased, while so working, of giving him warning. The risk was an obvious one, and assumed by deceased as one of his employment.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Pauline Precodnick, administratrix of Samuel Precodnick, against the Lehigh Valley Railroad Company of New Jersey. Judgment for defendant, and plaintiff brings error. Affirmed.

*Herbert Clark Gilson*, for plaintiff in error.

*Collins & Corbin*, for defendant in error.

VROOM, J. The plaintiff's intestate was employed by the defendant as a track repairer and was a member of a gang of 10 or 12 men who were working on the east side of a highway bridge near Park View, N. J. During the morning of the accident, Precodnick had been sent by the foreman to a point on the west side of the bridge, 225 feet west therefrom, to assist a signal and repair man there. The bridge was 100 feet wide. The train that ran down the deceased had passed over the track on which the men were working some 10 minutes before the accident. It was going east on the east-bound freight track. A passenger train was following it, so it pulled clear on the switch, and allowed the passenger train to pass. After stop-

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\*For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risk of employees, see preceding case, and foot-note.

For the authorities in this series on the subject of the duty to warn and instruct employees, see foot-notes appended to *Denver & G. R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361; *Richards v. Sloss-Sheffield Steel & Iron Co.* (Ala.), 21 R. R. R. 36, 44 Am. & Eng. R. Cas., N. S., 36; foot-notes appended to *Chicago, etc., Ry. Co. v. Riley* (C. C. A.), 20 R. R. R. 403, 43 Am. & Eng. R. Cas., N. S., 403; foot-notes appended to *Western Ry. v. Russell* (Ala.), 20 R. R. R. 225, 43 Am. & Eng. R. Cas., N. S., 225.

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ping for 10 minutes, the conductor of the freight inquired of the foreman of the gang if it was all right to come back, and, on being informed that it was, he then gave the signal for the train to come back, and the engineer blew three long whistles, a reply to the conductor that he saw the signal. The train was backing, and was going from six to eight miles an hour when it got to the bridge. It passed the foreman and other men on the easterly side of the bridge, and when the caboose got to the bridge the conductor and foreman saw the deceased in the center of the track between the rails, and they and the other men tried to give him warning. He was standing on the east-bound track with his back to the approaching train, while a train going west on the adjoining track had passed the backing train. The deceased took no notice of the warnings given to him by the conductor and the men working on the east side of the bridge, and probably he did not hear them, owing to the noise made by the other train on the west-bound track. He was struck by the backing train and killed. It further appeared in the case that it was the custom, when a man is separated from the gang he is working with, and sent out by himself, that he is supposed to look out for his own safety. At the close of the plaintiff's case, a motion to nonsuit was made and refused by the trial judge; but, at the close of the case, a motion was made for the direction of a verdict for the defendant, upon the ground that it then appeared affirmatively that there was no negligence on the part of the defendant, and that the deceased had assumed the risks and was guilty of contributory negligence. This motion was granted, upon the ground that there was no evidence of negligence on the part of the defendant.

The contention on the part of the plaintiff was that the duty of the defendant to the deceased, in the exercise of reasonable care to secure the safety of the deceased, required that it give a careful, timely, and adequate warning of the approach of trains, in order that the dangers necessarily incident to the employment might not be increased, and that the deceased did not assume as a risk of his employment negligence on the part of the defendant in securing his safety by adopting and maintaining a safe system of warning of the approach of trains. In support of these propositions reliance was had upon the case of *D'Agostino v. Pennsylvania Railroad Co.*, 60 Atl. 1113, 72 N. J. Law 358. There the Supreme Court held that it was the duty of the railroad company to give warning of the approach of trains, and that the proofs showed that the custom of the company was to give such warning, and that the men relied upon such warning being given. It also appeared that the foreman left the work, going on some temporary duty, leaving the men unprotected and without cautioning D'Agostino to look out for himself. This carelessness, which resulted in the death of D'Agostino, was held to be the carelessness of the company.

The same custom or system as to warning existed in the pres-



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ent case, and if plaintiff's intestate had been working with the gang, under the immediate direction of the foreman, he would have had the right to expect warning of approaching danger, and the failure to give it by reason of the negligence of the foreman would have been the negligence of the company, for which it would have been liable. The proofs, however, disclosed that he was not so working. He had been sent away from the rest of the gang and was at work 325 feet from them and was out of hearing of the foreman's voice in case of noise created by passing trains. It must have been manifest to him that, working there, he could not rely upon the customary warning of danger from approaching trains, and it would be incumbent upon him to look out for his own safety. It cannot be contended that it was the duty of the foreman to leave the rest of the gang and go with him, with the view of notifying him of approaching danger, or that there was a duty resting upon the company to send some one, other than the foreman, with him to warn him. In my judgment the risk at that place clearly became an obvious one and must be held to have been assumed by the deceased as one of his employment, and this is the more apparent when by the uncontradicted proof in the case it was shown that it was the custom that, when a man was sent out by himself, he was supposed to watch out for his own safety. Deceased therefore had "no right to expect the warning before the danger became actual," as in the D'Agostino Case.

This case is also distinguishable from that of Albanese v. Central Railroad Company, 70 N. J. Law 241, 57 Atl. 447. There the plaintiff's intestate was working on a railroad track in such a position as prevented his seeing an approaching train, and the engineer of the train, having the workman in sight, failed to sound a warning and ran him down. This court said that "the fact there was no custom to give signals, and that no instructions were issued to workmen about the approach of trains, may have resulted from a belief that, ordinarily, the workmen were exposed to no danger which, with reasonable care, they could not avoid, that ordinarily they would 'look out for themselves;' but it surely would not induce a workman to expect that, if he were actually working on the track in such a position as prevented his seeing an approaching train, the engineer of the train, having the workman in sight, would fail to sound a warning or run him down. Such exceptional conditions required and therefore justified the expectation of an audible signal, whether signals were customarily given or not." It cannot be contended that, in the case under consideration, the deceased was working in such a position as to prevent his seeing the approaching train. True, he was working with his back to the train, yet could have seen the train had he looked. He knew he was in a place of danger, and ordinary caution should have impelled him from time to time to make observations, not only in front, but to the rear, in order to guard

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against any possible risk from trains approaching from either direction. The train was a long one, and was backing, and deceased was not in sight of the engineer, as was the workman in the Albanese Case. The usual signal for backing, three long whistles, had been given when the train began to move, and every effort was made to warn deceased as it neared the place where he was working, when it was seen he did not notice its approach; but the cries of the men calling to him were evidently drowned by the noise of a passing train. It was necessary for the train to back in the course of its operation, and I find in the case no proof of the want of any reasonable care on the part of the employees of the defendant company. There exists no exceptional conditions which bring this case within the ruling of *Albanese v. Central Railroad Co., supra*.

The case was tried before the same learned justice who wrote the opinion in the Albanese Case, and the facts justify the distinction made by him between the two cases. I find nothing calling for the submission of the case to the jury, and agree with the direction of a verdict, upon the ground that there was no evidence of negligence on the part of the defendant.

The judgment below is affirmed.

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**McEWEN v. CENTRAL OF GEORGIA RY. CO.**

(Supreme Court of Georgia, Dec. 13, 1906.)

[56 S. E. Rep. 289.]

**Master and Servant—Injury to Servant—Evidence.\***—The plaintiff claimed damages resulting from the derailment of a hand car; the derailment being brought about by a tool falling from the car to the track. If the tool was upon the car in an improper position, this fact was apparent to the plaintiff, who was riding thereon, and who had helped load the same. Under these conditions there could be no recovery by him resulting from the improper loading of the car. On the other hand, if the tool was properly loaded, and nevertheless fell from the car, the occurrence was a pure accident, a thing entirely unexpected and not to be anticipated in the usual course of events, and could not be the foundation for an action against the company. *Freyermuth v. South Bound Railroad Co.*, 32 S. E. 668, 107 Ga. 31; *B. & W. R. Co. v. Smith*, 25 S. E. 759, 97 Ga. 777.

(Syllabus by the Court.)

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\*For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see preceding case, and foot-notes.

For the authorities in this series on the subject of the degree of care required of a railroad company, as an employer, see *St. Louis, etc., R. Co. v. Hill* (Ark.), 21 R. R. R. 20, 44 Am. & Eng. R. Cas., N. S., 20; *Anderson v. Northern Pac. Ry. Co.* (Mont.), 21 R. R. R. 23, 44 Am. & Eng. R. Cas., N. S., 23; *Wiest v. Coal Creek R. Co.* (Wash.), 20 R. R. R. 398, 43 Am. & Eng. R. Cas., N. S., 398.

**Barschow v. Lake Shore & M. S. Ry. Co**

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by F. E. McEwen against the Central of Georgia Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

*Seaborn & Barry Wright*, for plaintiff in error.

*J. B. Branham*, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

**BARSCHOW v. LAKE SHORE & M. S. RY. CO.**

(Supreme Court of Michigan, March 5, 1907.)

[110 N. W. Rep. 1057.]

**Master and Servant—Injuries to Servant—Assumed Risk—Knowledge of Danger.\***—Where plaintiff, a servant of defendant railroad company, would not have been injured by a defect in a turntable except for the defective condition of the engine or the pilot on which he was riding, he was not precluded from recovery by the fact that he had knowledge of the defective condition of the turntable and assumed the risk thereof.

**Same—Negligence—Defective Engine.**—Where plaintiff, a round-house employee, was injured while riding on the pilot of an engine bound for the shops for repairs because of a defect in the boxes of the engine, defendant was negligent in requiring plaintiff to work with such engine.

**Same—Contributory Negligence—Questions for Jury.**—Where plaintiff was riding on the pilot of an engine at the time he was injured, in accordance with the custom and by the directions of his superior officers, whether he was guilty of contributory negligence in assuming such position was for the jury.

**Same—Assumed Risk—Knowledge of Danger.\***—Where plaintiff had never seen the engine on which he was riding until the time of his injury, and had no knowledge that its pilot was low, he did not assume the risk thereof.

**Same—Contracts—Construction.**—A contract of employment for railroad service provided that plaintiff, before exposing himself in working with or being in any manner on or with its cars, engines, tools, machinery, etc., would carefully examine their condition. Held, that such agreement merely obligated plaintiff to use care, and did not require him to discover the defective condition of the pilot of an engine on which he was riding at the time he was injured.

**Evidence—Best Evidence—Railroad Rules.**—A witness was not en-

\*For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see preceding case, and foot-notes.

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titled to testify that it was against the rules of defendant railroad company for persons to expose themselves to such dangers as riding on the pilot; the rules themselves being the best evidence.

**Trial—Request to Charge—Refusal.**—It is not error to refuse requests to charge which are covered by instructions given.

Error to Circuit Court, Lenawee County; Guy M. Chester, Judge.

Action by Charles Barschow against the Lake Shore & Michigan Southern Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Argued before CARPENTER, C. J., and McALVAY, OSTRANDER, HOOKER, and MOORE, JJ.

*Dallas Bondeman*, for appellant.

*Smith, Baldwin & Alexander*, for appellee.

CARPENTER, C. J. Plaintiff recovered a verdict and judgment in the circuit court. Defendant asks us to reverse that judgment for various reasons, which we will consider in detail.

First. Defendant contends that the trial court should have directed a verdict in its favor. The consideration of this contention requires a brief statement of the case, which statement we make, as we should, most favorably to plaintiff. At the time of his injury plaintiff was employed by the defendant in its round house in the city of Adrian. It was his duty to assist in cleaning and coaling engines brought to said roundhouse by the engineer who had charge of the same upon the road. These engines were coaled at a coaling dock a short distance from the roundhouse. About 8 o'clock on the evening of April 18, 1903, as one of these engines, viz., engine No. 119, was passing from the stationary track to the track on said turntable, its pilot, upon which plaintiff was standing, struck the projecting rail on the turntable with such force as to throw plaintiff to the ground and injure him. The collision was due to the circumstance that both the turntable and the pilot were out of repair. The turntable was "lop-sided;" that is, one of its rails projected an inch or two higher than the rails of the stationary track at their junction. The defect in the pilot (caused by wearing of the boxes) was this: It was only an inch and a half above the track, while pilots on ordinary engines are four inches above the track.

Defendant contends that plaintiff assumed the risk of all danger resulting from the defective turntable, because he was fully informed of its condition. For the purpose of this opinion we assume this contention to be sound. It does not follow, however, that defendant was entitled to a verdict, for plaintiff would not have been injured—at least the jury may have so found—except for the defective condition of the engine. It may therefore be said that, notwithstanding his assumption of the risk of the defective turntable, plaintiff may still recover if he has a cause of action on account of defendant's negligence in

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furnishing an engine with a defective pilot. He has such a cause of action? It is quite certain that there was evidence that defendant was negligent in furnishing the engine with a defective pilot, for the engine at the time of plaintiff's injury was on its way from Monroe to Elkhart "for repairs." From this circumstance the jury might have inferred that defendant knew or should have known of its defective condition.

It is contended that plaintiff was guilty of contributory negligence, because he was riding upon the pilot. There is testimony that he rode there in accordance with a custom and by the direction of his superior officers. Under these circumstances we think the question of contributory negligence was one for the jury. Neither can it be said that plaintiff assumed the risk of the defective pilot. The defect was unknown to him, and it would be going too far to say that he was bound to discover it; for he had never seen the engine before. In this connection we notice the contention of defendant that plaintiff could not recover, because in his contract of employment he had agreed "before exposing myself \* \* \* in working with or being in any manner on or with its cars, engines, machinery or tools, carefully examine the condition of all \* \* \* machinery, tools, \* \* \* cars, engines or whatever I may undertake to work upon or with, before I make use of or expose myself on or with the same, so as to ascertain their condition and soundness." This agreement merely obligated plaintiff to use care. It did not require him to discover the defective condition of the pilot. I conclude, therefore, that the trial court did not err in refusing to direct a verdict for defendant.

Second. Many complaints are made of rulings upon the introduction of testimony. Most of these complaints relate to rulings which were entirely correct. For instance, the court refused to permit one of the defendant's witnesses to testify that it was against the rules of the company for persons to expose themselves to such dangers as riding on the pilot. This decision proceeded upon the assumption that the rules were in writing. We think the trial court had a right to act upon that assumption, and, had it been unfounded, it is to be presumed that defendant's counsel would have so stated. The ruling was correct. Some of these complaints relate to rulings admitting testimony which might properly have been excluded; but it cannot be said that any of this testimony had a tendency to avert the attention of the jury from the real issue, or to lead them to an erroneous decision of that issue. In other words, the objectionable rulings were not prejudicial.

Third. Defendant asked the trial court to give certain requests in which were set forth in detail the rules of the company, portions of which had no relation whatever to plaintiff's injury. Instead of giving these requests, the trial court covered the subject in a few general and appropriate words. We think this was proper. Defendant's other requests were, so far as appropriate, covered by the general charge of the court.

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Fourth. Charge of the court. Defendant's complaints of the charge of the court, in so far as they have not already been disposed of by this opinion, are largely based upon the contention that they were not warranted by the testimony. It is a sufficient answer to say that we think they were so warranted.

Fifth. Refusal of the court to grant a new trial. It is contended that the trial court erred in refusing to grant a new trial upon the ground that the verdict was contrary to the law and the weight of the evidence. We think this contention is not well founded.

The judgment is affirmed.

## ST. LOUIS, I. M. &amp; S. RY. CO. v. INMAN.

(Supreme Court of Arkansas, Feb. 4, 1907.)

[99 S. W. Rep. 832.]

**Master and Servant—Injuries to Servant—Contributory Negligence—Evidence.\***—In an action for the death of an employee alleged to have been caused by the negligence of the employer, and defended on the ground of contributory negligence, proof that the employee was a cautious and prudent man was inadmissible to show that he was not guilty of contributory negligence at the time of the injury.

**Same—Care Required of Master.†**—It is the duty of a master to provide a servant with suitable appliances with which to do his work and to provide a suitable place in which he can, on exercising due care, perform his duties without exposure to dangers not within the scope of his employment.

**Same.†**—It is the duty of a railroad employing men to remove a wreck caused by a freight train breaking through a span of a bridge, and to repair the broken span, to adopt such reasonable precautions

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\*See extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296.

†For the authorities in this series on the subject of the degree of care due from a railroad as an employer, see foot-notes appended to St. Louis, etc., R. Co. v. Hill (Ark.), 21 R. R. R. 20, 44 Am. & Eng. R. Cas., N. S., 20; Anderson v. Northern Pac. Ry. Co. (Mont.), 21 R. R. R. 23, 44 Am. & Eng. R. Cas., N. S., 23; Wiest v. Coal Creek R. Co. (Wash.), 20 R. R. R. 398, 43 Am. & Eng. R. Cas., N. S., 398.

For the authorities in this series on the subject of the degree of care required of a railroad company as an employer, in furnishing appliances, see foot-notes appended to Denver & G. R. Co. v. Burchard (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361.

For the authorities in this series on the subject of the degree of care required of a railroad as an employer, in furnishing a safe place to work, see foot-notes appended to Norfolk & W. Ry. Co. v. Gesswine (C. C. A.), 20 R. R. R. 553, 43 Am. & Eng. R. Cas., N. S., 553; foot-notes appended to McTaggart v. Maine Cent. R. Co. (Me.), 19 R. R. R. 240, 42 Am. & Eng. R. Cas., N. S., 240.



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for the safety of the employees as a reasonable and prudent man would consider sufficient for his own safety under the same circumstances.

Appeal from Circuit Court, White County; H. N. Hutton, Judge.

Action by Matilda Inman, administratrix of L. H. Inman, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for new trial.

*B. S. Johnson and S. D. Campbell*, for appellant.

*S. Brundidge, Jr., and J. W. & M. House*, for appellee.

BATTLE, J. Matilda Inman, as administratrix of L. H. Inman, deceased, brought this action against the St. Louis, Iron Mountain & Southern Railway Company to recover damages occasioned by the death of her intestate. She alleged in her complaint that L. H. Inman was, on the 12th day of September, 1904, a bridge carpenter and was in the employment of the defendant, and that one J. A. Woodall was the foreman of a gang of men with which he was working at that time, and on that day, while working under such foreman on a bridge of the defendant across the Ouachita river, near Arkadelphia, another gang, of which Frank Marrs was foreman, willfully and negligently cut the bolts and supports of an iron beam in the bridge, and thereby caused the same to fall upon and kill Inman; that deceased left plaintiff, Matilda Inman, his widow, and two children, Fred Inman, aged 20 years, and Anna Inman, aged 13 years, him surviving.

The defendant answered and denied the allegations in the complaint, and alleged that the death of Inman was caused by his own contributory negligence, and was the result of, and incident to, his employment, and within the risks and hazards assumed by him.

The following facts were shown by the evidence adduced in the trial before a jury in this action: On the 11th of September, 1904, a freight train of the defendant broke through and wrecked a span of the bridge across the Ouachita river near Arkadelphia. Immediately all available gangs of workmen in the employment of the defendant, and they were many, were called to remove the wreckage and repair the broken span, each gang having a foreman. But the superintendence of this work was under S. H. Busby, and all worked as one gang under him. On the 12th day of September, 1904, while Inman, who was a bridge carpenter and a member of one of the gangs, was engaged in this work, and while he was taking measurements for the purpose of repairing the bridge, other men were cutting rivets and taking away parts of the wreckage of the span as fast as possible. This span, before the wreck, was supported by two large rock piers some distance apart, and when the freight train broke through the span there were portions of the broken

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span left so that, while parts of the freight train and of the wrecked span rested against one corner of the pier, there was, as to that part of the pier opposite, a distance in the clear, between the wreckage and the north side of the south rock pier, of from two to five feet—at least such clear space sufficient for a man to ascend or descend a rope between the wreckage and the pier. This pier was about 20 feet high, and about 18 feet wide at the top, about 5 or 6 feet thick at the top, and all dimensions increasing towards the base (or “flaring” as termed by the witnesses). There was a rope fastened to one of the ties at the top of the pier and hanging down to the base so that it could be turned in any manner as to the pier—on the north side between the pier and the wreckage or alongside the shortest diameter of the pier on either side, or on the north side of the pier (its longest diameter) being the opposite side from the wreckage. This rope, for a part of the time, was suspended on one side and a part of the time on the other. When Inman descended it the last time it was hanging between the wreckage and the north side of the south pier. It had been used indiscriminately by persons ascending and descending. Who changed it from one side of the pier to the other, or why the change was made, the evidence does not show. But it does show that it was used by different people, and that some, in descending, came down until the wreckage was reached and then got on that to work, or to go down to the bottom, while others would continue on the rope to the end. The wreckage stood with the distance from two to five feet between it and the pier, as before stated, from some time early in the night of the 11th of September, 1904, until about 2 o'clock in the afternoon of the next day, when the wreckage gave way while Inman was descending the rope between it and the pier, about half way down, and fell against him. The cause of the fall was the cutting of the rivets or bolts which held the wreckage together, by the men engaged in that work. A severe injury was inflicted upon Inman by the fall from which he died in a few hours.

In the trial plaintiff was allowed to adduce evidence, over the objection of the defendant, tending to prove that the deceased, Inman, was “a cautious, careful, and prudent man, who avoided taking danger.”

The jury returned a verdict in favor of the plaintiff for \$5,000, and the defendant appealed.

The evidence admitted by the court over the objection of the defendant was incompetent. It did not tend to show that the deceased pursued any particular course of conduct at the time he was killed, or that he did or did not any act not shown by the evidence. It does not tend to show such invariable regularity of action or conduct by him in the past as to make it probable that he did or failed to do any act at the time he was killed. Unless it had that effect how could it enable the jury to determine whether he was or was not guilty of contributory negligence at the time he was killed? The statement that he was

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careful and cautious was merely an expression of an opinion of a witness, and threw no light upon any issue in the case. From the admission of it as evidence the jury might have inferred it was for the purpose and sufficient to show that deceased was not guilty of negligence. It was misleading and prejudicial, and the court erred in admitting it. *Hot Springs Street Railway Company v. Bodeman*, 76 Ark. 302, 88 S. W. 960; *Railway Company v. Harrell*, 58 Ark. 454, 21 S. W. 117; *Chase v. Maine Central Railroad Company*, 52 Am. Rep. 744; 6 Thompson on Negligence (2d Ed.) § 7883; 1 Wigmore on Evidence, § 92; *Louisville & N. R. Co. v. M'Clish*, 115 Fed. 275, 277, 53 C. C. A. 60.

Inasmuch as the judgment in this case will be reversed, and the cause remanded for a new trial, we deem it necessary to consider what was the duty of the appellant to provide for the protection of Inman and other persons in its employment and engaged in removing the wreck of the bridge, at the time of the accident which caused the death of Inman, and to make suggestions as to the law regulating the rights of the parties to this action in a case wherein the pleadings are properly drawn, to the end the parties may take advantage of them if they see fit.

There was a large force of men engaged in removing the wreck and repairing the bridge at the time the accident occurred. They were exposed to great danger and injury, as shown by the evidence in this case. What was the duty of appellant to them as to such danger?

As a general rule it is the duty of the master to provide the servant with suitable instruments and means with which to do his work, and to provide a suitable place in which such person, when exercising due care himself, can perform his duty safely or without exposure to dangers that do not come within the obvious scope of his employment. It would be a breach of his duty to expose a servant, who, by reason of his youth or inexperience, is not aware of, or does not appreciate, the danger incident to the work he is employed to do, or the place he is engaged to occupy, without first giving him such instructions and caution as would, in the judgment of men of ordinary minds, understanding, and prudence, be sufficient to enable him to appreciate the dangers, and the necessity for the exercise of due care and caution, and to do the work safely, with proper care on his part. *Emma Cotton Seed Oil Co. v. Hale*, 56 Ark. 232, 19 S. W. 600.

In *Railway Company v. Triplett*, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, where a car repairer was engaged in work under a car upon a railroad track, and so situated that he could not protect himself and that a jar from an approaching car would cause it to fall and crush him, it was held that it was the duty of the railway company, "by the exercise of ordinary care, to provide the car repairer with a safe place in which to work, and that it might do so by adopting such rules and regulations as would be sufficient for that purpose when faithfully ob-

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served by its employees, and when the circumstances were such that a reasonably prudent person might have relied upon rules and regulations to afford protection, and that, if he saw proper to rely upon such methods of protection, and the occasion demanded it, he should also have adopted such measures as would have reasonably been necessary to secure the observance of such rules." *Fordyce v. Briney*, 58 Ark. 206, 24 S. W. 250; *Kenefick-Hammond Company v. Rohr*, 77 Ark. 290, 91 S. W. 179.

In *Kenefick-Hammond Co. v. Rohr*, 77 Ark. 290, 91 S. W. 179, the defendant was engaged in constructing a railway. Plaintiff was in its employment. At the particular time and place when and where the plaintiff was injured construction work was being done on the line of the road, which ran along the side of a mountain, about 250 yards from the valley below. Laborers in the employment of the defendant were engaged in making a cut. Two sets of men were drilling holes in the earth and rock for the reception of powder for blasting. A portable boiler was used to furnish steam to operate the drills, and plaintiff and an assistant operated the same. On account of the character of the ground, trees, and underbrush intervening, plaintiff, at the boiler, and the men at the drills could not see each other. When a hole was finished it was charged with powder, and the same was discharged. This court held that it was the duty of the defendant to provide reasonable means and precautions for the protection of plaintiff against the blasts.

It follows, then, that it was the duty of appellant to have adopted and used reasonable means and precautions to provide for the safety of Inman at the time of the accident, which were such as a reasonable and prudent man would have considered sufficient for his own safety under the same circumstances. 1 *Labatt on Master and Servant*, §§ 14-17.

For the error indicated, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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**KENTUCKY & INDIANA BRIDGE & R. CO. v. MORGAN.**

(Supreme Court of Indiana, March 13, 1907.)

[80 N. E. Rep. 536.]

**Master and Servant—Injuries to Servant—Defective Appliances.\*—**

It is the duty of the master to exercise ordinary care to furnish or provide machinery and appliances reasonably safe and suitable for his employees, and to exercise a reasonable supervision in keeping them in a reasonably safe condition for use.

**Same—Pleading—Negligence of Master.\*—**In an action for personal

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\*See preceding case, and foot-notes.

For the authorities in this series on the subject of the care required of a railroad company, as an employer, in inspecting appliances, see foot-notes appended to *Gulf, etc., R. Co. v. Larkin* (Tex.), 19 R. R.

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injuries while employed as a motorman, the first paragraph of the complaint alleged that it was necessary for the safe operation of the car and the safety of the employees in charge that the brake rod should be sound and in good condition; that at the time of the injury said brake rod was in a dangerous and defective condition, which was unknown to plaintiff, but was well known to defendant. The second paragraph was the same as the first, except that it stated that it was necessary that the brake rod should be of sufficient size and to stand the pressure of the brakes, and that said rod was defective, in that it was too small and insufficient to stand such pressure, which was unknown to plaintiff, but was well known to defendant, or could have been known by it by reasonable diligence. There was no charge that the rod was in a defective condition when placed in the car, but the theory was that it became defective by wear. Held, that no actionable negligence was alleged; it not being charged that defendant had knowledge of the defect a sufficient length of time to have repaired it.

Appeal from Circuit Court, Floyd County; Wm. C. Utz, Judge.

Action by James Moran against the Kentucky & Indiana Bridge & Railroad Company. From a judgment for plaintiff, defendant appealed to the Appellate Court (79 N. E. 213), by which the case was transferred to the Supreme Court under Burns' Statutes 1901, § 1337j, subd. 1.

*Geo. H. Hester and E. P. Humphrey*, for appellant.  
*Stotensberg & Weathers*, for appellee.

JORDAN, J. The complaint consists of two paragraphs, in each of which appellee seeks to recover damages for personal injuries sustained while in the employ of appellant as a motorman in the operation of its electric railroad. A demurrer to each paragraph of the complaint for insufficiency of facts was overruled, to which an exception was reserved. Answer general denial. Trial by jury, and a general verdict returned in favor of appellee, awarding him damages. Along with this verdict the jury returned answers to a series of interrogatories. The motion by appellant for a new trial, based upon various grounds, was denied, to which ruling it excepted. Judgment on the verdict.

The errors assigned herein relate, first, to the decision of the court in overruling the demurrer to the complaint and to each paragraph thereof; second, in denying the motion for a new trial. The first paragraph of the complaint may be summarized as follows: On the 11th day of March, 1904, the defendant (appellant herein) was a bridge and railroad corporation organized under the laws of the state of Kentucky. It owned and

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R. 235, 42 Am. & Eng. R. Cas., N. S., 235; *Wood's Adm'x v. Southern Ry. Co.* (Va.), 19 R. R. R. 19, 42 Am. & Eng. R. Cas., N. S., 19; *Crawford v. United Rys. & Elec. Co.* (Md.), 17 R. R. R. 527, 40 Am. & Eng. R. Cas., N. S., 527.

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operated a line of electric railroad between the cities of New Albany, Floyd county, Ind., and Louisville, in the state of Kentucky, and on said day was engaged in the business of a common carrier of passengers for hire. This line was equipped with motor cars propelled by electricity, and these cars were used by the defendant for the carriage and transportation of passengers. That among the cars so owned and operated by the defendant in its aforesaid business was motor car No. 9. That on the aforesaid 11th day of March, 1904, plaintiff was in the employ of defendant, serving as a motorman, and by its direction he was on said day placed in charge of said motor car No. 9 to work and operate thereon as a motorman. This car was equipped with air brakes which were operated by the motorman in charge thereof by means of a lever, or handle, in the front vestibule. That said brakes consisted of brake shoes attached to the brake beam, and the latter was connected with the air apparatus on the car by an iron rod, about 12 feet long and  $\frac{3}{4}$  of an inch in diameter, commonly known and called a "brake rod." It is alleged that it was necessary for the safe operation of said car and the safety of the passengers carried therein and of the employees of the defendant in charge thereof that said brake rod should be sound and in good condition and capable of standing the pressure and the force of said brakes when applied. On said day the brake rod on said car was in a dangerous and defective condition, in this: that said rod contained a break or flaw therein, which rendered the same weak and insufficient for the purpose for which it was intended, and liable to break; that the dangerous and defective condition of said brake rod was unknown to the plaintiff, but was well known to the defendant, or by reasonable diligence in the premises could have been known to said defendant. On said day, while the plaintiff was operating this car from the city of Louisville to the city of New Albany, and while the car was approaching the tracks of the Pennsylvania Railroad, which crossed the tracks of defendant at right angles at Vincennes and Main streets, in said city of New Albany, and while said car was running down-grade, it became necessary for the plaintiff to apply the brakes on said car in order to stop it before reaching the crossing of the track of the Pennsylvania Railroad. In order to do this, the plaintiff applied the brakes, turning the lever, or handle, thereof, whereupon said brake rod, by reason of its defective condition, broke, and by reason thereof plaintiff was unable to stop said car, and it, without any fault or negligence on his part, ran into and against a train standing on the tracks of the Pennsylvania Railroad. That in said collision, and by reason thereof, plaintiff was caught in said car and injured in his right hip, leg, back, spine, etc., and permanently crippled, etc., wherefore he demands damages for \$2,000.

The second paragraph of the complaint is the same as the first paragraph, except that the defect in the brake rod is set out in the following language: "That it was necessary for the



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safe operation of said car and the safety of the passengers thereon and of the employees of the defendant in charge thereof that said brake rod should be of sufficient size and thickness to stand the pressure and force of said brakes when applied; that said rod was defective, in this: that it was too small and insufficient to stand the pressure of the brakes when applied, which was unknown to the plaintiff, but was well known to the defendant, or could have been known by it by the exercise of reasonable diligence in the premises."

Counsel for appellant argue that each paragraph of the complaint is insufficient in the statement of material facts, and therefore the court erred in overruling the demurrer. This court has repeatedly affirmed the well-settled rule relating to master and servant, that it is the legal duty of the former to exercise ordinary care to furnish or provide machinery and appliances reasonably safe and suitable for his employees to perform their duties. It is the further duty of the master to exercise a reasonable supervision over such machinery and appliances, and to use ordinary care in keeping or maintaining the same in a reasonably safe condition for use. *Ohio, etc., R. Co. v. Percy*, 128 Ind. 197, 27 N. E. 479; *Evansville, etc., R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355; *Indiana, etc., Ry. Co. v. Snyder*, 140 Ind. 647, 39 N. E. 912; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 66 N. E. 882, 98 Am. St. Rep. 281. In an action by an injured servant whose injury is due or attributable to defects in machinery or appliances which he was using in the performance of the work for which he had been employed to perform, he, among other things, is required to show in his pleading that the master has failed to exercise the care exacted by law in originally providing the machinery or appliances in question, or that he has neglected to use the required care in keeping or maintaining such machinery or appliances in reasonably safe repair. 13 Ency. of Pl. Pr. p. 894.

Keeping in mind the well-settled principles to which we have referred, we pass to the consideration of the sufficiency of the complaint herein. The question is presented: Does this pleading set out such a case of negligence on the part of appellant in the discharge of the duties imposed upon it by law as to constitute a right of action in favor of appellee for the injuries of which he complains? It will be noted that the first paragraph states that it was necessary for "the safe operation of said car and the safety of passengers carried thereon and of the employees of the defendant in charge thereof that said brake rod should be sound and in good condition and capable of standing the pressure and force of said brakes when applied." Possibly, by this latter statement, the pleader intended to show that the maintenance of the brake rod in the condition as therein stated to be necessary for the safe operation of the car and for the safety of the employees in charge thereof was a duty which defendant, under the law, owed to plaintiff. The pleading then proceeds to state that on said day (i. e., March 11, 1904) said brake rod on said car was in a "dangerous condition, in this:

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that said rock contained a break or flaw therein which rendered the same weak and insufficient for the purpose for which it was intended, and liable to break; that the dangerous and defective condition of said brake was unknown to the plaintiff, but was well known to the defendant," etc. There is no charge that the rod in question was in a defective condition when it was originally placed in the car, but apparently the theory is that it became defective by use and wear. In no part of the paragraph in question, however, does the pleader in express or direct terms impute or attribute negligence to the defendant in the discharge of the duties imposed upon it by law. The plaintiff apparently relies on the bare facts stated therein to justify or raise the presumption or inference that appellant was guilty of actionable negligence, without any direct or positive averments relative thereto. In an action at common law by a servant to recover damages against the master, founded upon the failure of the latter to perform his legal duties, to render the complaint sufficient to repel a demurrer, the act done or omitted to be done should be characterized to have been negligently done or to have been negligently omitted, as the case may be. Negligence must at least be shown by the pleading, either by direct or positive averments or from the statement of such facts therein as will clearly raise or create an inference that the injury of which the plaintiff complains is the result or proximate cause of defendant's negligence. *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874, and authorities there cited; *Laporte Carriage Co. v. Sullender*, 165 Ind. 290, 75 N. E. 277; *Pittsburgh, etc., R. Co. v. Peck*, 165 Ind. 537, 76 N. E. 163, and authorities there cited; *Malott, Receiver, v. Sample*, 164 Ind. 645, 74 N. E. 245; *Chicago, etc., R. Co. v. Barnes*, 164 Ind. 143, 73 N. E. 91, and authorities there cited. In the latter case this court said: "The rule affirmed by repeated decisions of this court is that a general averment of negligence has a technical signification, and in an action for negligence, if the legal duty and a violation thereof are disclosed, the general averment of the negligence complained of will be sufficient on demurrer"—citing authorities.

The mere facts, standing unaided by any other averments, which disclose that the brake rod on the day of the accident contained a break or flaw therein which rendered the same, as charged, "weak and insufficient and liable to break," which condition was unknown to the plaintiff, but was well known to the defendant, are not such as clearly raise, as a matter of law, a presumption or inference that the defendant was guilty of negligence. There are no specific or general averments to show that the defendant, after it was chargeable with knowledge, either actual or constructive, in respect to the defective appliance in question, continued thereafter to use or permit it to be used in the operation of the car. For aught, appearing to the contrary in the complaint, the defendant may not have had notice of the alleged condition of the brake rod until the day of the accident, and after it had placed the car in charge of the plaintiff. We cannot indulge the presumption in favor of the plaintiff that

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the defendant, after notice of its defective condition, negligently failed to remedy or repair the defects, or that it negligently permitted the car to be used or operated by plaintiff while equipped with the brake rod in its defective or weak condition. As against the pleading, nothing to the contrary appearing, we may assume that the time which intervened between that at which the defendant acquired notice or knowledge, actual or constructive, of the insufficient condition of the brake rod and the time of the accident, was not, under the circumstances, of sufficient length to afford the defendant a reasonable opportunity to repair or remedy the defects in question, or at least to warn the plaintiff prior to the accident of the danger with which he was confronted in the operation of the car. *Lake Shore, etc., R. Co. v. Stupack*, 123 Ind. 210, 23 N. E. 246; *Scheiber v. United Telephone Co.*, 153 Ind. 609, 613, 55 N. E. 742; *Malott, Receiver, v. Sample, supra*. Had there been a general averment or charge that the defendant had negligently failed or omitted to remedy or repair the defects in the brake rod, such a charge would have been sufficient to have embraced or shown the facts that the defendant had been afforded a reasonable time or opportunity to remedy the defects in question after their discovery. *Conrad v. Gray*, 109 Ala. 130, 19 South. 398. See other authorities hereinbefore cited on the sufficiency of the general charge of negligence.

It follows, for the reasons herein stated, that the first paragraph of the complaint must be held insufficient. The second paragraph, upon the charge of negligence, is equally as deficient as the first. It is manifest, therefore, that the court erred in overruling appellant's demurrer to each paragraph, for which error the judgment is reversed. Other alleged errors, based on the denial of the motion for a new trial, are discussed by appellant's counsel, but as a reversal of the judgment below for insufficiency of the complaint will, upon another trial, necessarily result in reforming the issues, hence we pass these questions without consideration, as it is not clear that they will again arise.

This case has been transferred to this court by the Appellate Court because it was the opinion that the case of *Malott v. Sample, supra*, was out of accord with the law as above declared. That case, as will be perceived from a reading of it, rests on the exceptional manner in which knowledge was sought to be averred. It is true that the complaint which was then before the court contained two averments of negligence; but the first of said averments confined the negligence to the time when the defendant, by the exercise of ordinary care, might have discovered the defect, while the second was coupled with, and a part of, a mere assumption of the existence of matter which had not been directly averred. Thus understood, *Malott v. Sample, supra*, is in no wise out of accord with the authorities.

Judgment reversed and cause remanded, with instructions to the lower court to sustain the demurrer to each paragraph of the complaint, with leave to amend.

## LYON v. CHARLESTON &amp; W. C. RY.

(Supreme Court of South Carolina, Dec. 17, 1906.)

[56 S. E. Rep. 18.]

**Master and Servant—Injury to Servant—Negligence.**—In an action for injuries to a flagman on defendant's freight train, while attempting to uncouple a moving car, evidence held insufficient to show negligence of defendant.

**Same—Fellow Servants.\***—A flagman who was instructed to obey the orders of the conductor and engineer, while the conductor is in charge of the train, and obeying his orders, is a fellow servant with the engineer.

**Same—Negligence.**—Where failure of a carrier to have cars in a train equipped with air brakes operated from the engine, as required by the act of Congress, was not the proximate cause of the servant's injury, such failure cannot be assigned by the servant as negligence.

**Same—Assumption of Risk.†**—In order that a servant may be held not to have assumed risks of his employment, which he would not reasonably expect to encounter because not within the scope of his contract of hiring, it must be shown that he was transferred to essentially new duties, and that the order under which he acted was negligent.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Greenwood County; Memminger, Judge.

Action by A. B. Lyon against the Charleston and Western Carolina Railway. Judgment for plaintiff, and defendant appeals. Reversed.

*S. J. Simpson and McGhee & Richardson*, for appellant.

*Grier & Park*, for respondent.

\*For the authorities in this series on the question whether a locomotive engineer is a fellow servant with respect to other employees of his company, see foot-notes appended to *Kane v. Erie R. Co.* (C. C. A.), 20 R. R. R. 383, 43 Am. & Eng. R. Cas., N. S., 383.

For the authorities in this series on the subject of the superior servant limitation of the fellow servant rule, see foot-notes appended to *Kane v. Erie R. Co.* (C. C. A.), 20 R. R. R. 233, 43 Am. & Eng. R. Cas., N. S., 233; *Choctaw, etc., Ry. Co. v. Doughty* (Ark.), 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665; *Sherman v. Texas & N. O. R. Co.* (Tex.), 18 R. R. R. 637, 41 Am. & Eng. R. Cas., N. S., 637.

†See foot-notes appended to *North Carolina St. R. Co. v. Aufmann* (Ill.), 20 R. R. R. 421, 43 Am. & Eng. R. Cas., N. S., 421; foot-notes appended to *Ives v. Wisconsin Cent. Ry. Co.* (Wis.), 20 R. R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393; foot-notes appended to *Drake v. San Antonio & A. P. Ry. Co.* (Tex.), 20 R. R. R. 157, 43 Am. & Eng. R. Cas., N. S., 157.

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WOODS, J. The vital question in this case is whether the circuit judge erred in refusing a motion for a nonsuit, and for new trial.

The plaintiff, a flagman on defendant's freight train, while attempting to uncouple a moving car, fell on the track and had his leg crushed. He brought this action for damages and recovered judgment, alleging the accident was due to the defendant's negligence. Without taking up the exceptions in detail, we consider whether there is evidence to support any one of the several charges of negligence as a proximate cause of the injury. The case depends principally on the testimony of the plaintiff, who gave this account of the accident on his direct examination: "What did you do? We went and unloaded all of the freight that was for Hampton, and the conductor got out of the car and signed the engineer ahead, and the train rolled off at the rate of about three or four miles an hour. He ordered Stephen New, the brakeman, and myself, to cut the flat car loose, and let the rear of the train trail behind and roll clear of the siding, put the flat car in the side track, and come back to the main line and get the train and go on to Brunson to meet 41, a passenger train. Stephen New went and caught hold of the lever on the cattle car to cut it loose from the flat. The lever was hard to work, and it seemed like it was impossible for him to cut the car, and I knew I could not, and I crossed over to the corner of the flat car and pulled the lever, and a jerk from the car threw me under the rolling train behind. There was no air on the train. What happened when you fell under there? The front trucks of the cattle car rolled over me, broke my leg, fractured my hip and ankle, broke my collarbone, and bruised my shoulder, and cut a gash in my head." On cross-examination, he says: "Just state again how it happened; where were you and what were you undertaking to do, to carry out the conductor's orders? Just tell what you were doing. Stephen New, when we got orders, he went over and caught hold of the lever on the car and was pulling it. Was the lever on the car so that you could stand on the outside, without going in between the cars and uncouple it, one of those iron automatic levers? Yes, sir; it don't set outside the car, it sets in between. You can stand outside of the car without going in between them? Yes, sir. And you intended to turn the lever over and raise the peg up and uncouple the car? That was Steve New's idea, and it seemed he could not work this lever. When Steve New caught hold of that lever, where were you? On the flat car. Why did you get on the flat car? I was going down with the train, and when it got near the siding I was going to get on the top of the cattle car and apply the brakes, as ordered to do. How were you going to step across the gap between the flat car and the cattle car? Several ways; I could have got down on the ground and got up, or I could have reached over and got the ladder. You knew that Steve New was going to separate them as soon as he could? He was get-

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ting pretty close to the clear post, and he had not got them loose, and I just pulled the lever on the flat car. When Steve New first caught hold of the lever where were you? I was on the flat car. You got on the flat car? I was already on the flat car. I just got up to ride on down. There was not any need of my trotting beside it. You got on the flat car the first thing you did, before Steve New caught hold of the lever; that is true, is it not? I don't recollect about that. You knew that as soon as Steve New worked that lever, if it worked all right, the cars would separate? Yes, sir; but as I cut the car I was expecting to give my own signals, but it was done before I could do it. I thought you said that Steve New was going to cut the car off? I said he was trying to pull it up and it looked like he could not get the lever to work, and I pulled the lever on the flat car. But when you went on the flat car, you did not intend to have anything to do with the lever? I was going to carry out the orders of the conductor. Didn't you, when you got on the flat car, think that Steve New would operate the lever so as to separate the cars? I knew that was his intention, sir. And at the time you did not intend to have anything to do with uncoupling the cars? I was going to carry out the orders of the conductor, and I could not have done it otherwise. But when you got on the flat car, your intention was that Steve New should do the uncoupling, and then you were to get over on the other car and put on brakes? Yes, sir; but when he could not do it, there was but one lever on his side, and I was compelled to pull the lever. And when he had difficulty in uncoupling, you undertook to help him? Yes, sir."

1. Negligence as a proximate cause of the injury is charged against the conductor, in that he "ordered, required, and directed this plaintiff to get upon and uncouple the said cars while in motion, and get upon and apply the brakes to the trailing cars while in motion, and in leaving the train without seeing that his orders were carried out and the train operated with due care, without a sudden increase of the speed of the train."

The plaintiff's own account shows clearly the accident was due to his act of leaning over the corner of the moving car and uncoupling it by pulling a lever at the side. But there is no evidence whatever that the conductor ordered the plaintiff to get upon the moving car and uncouple it from that position, or even saw him when he did it. There is evidence of an order from the conductor to uncouple the moving car, but a lever was provided on each side of the car as a means of uncoupling from the ground. New, the brakeman, made an unsuccessful effort to use the lever on his side from the ground, and then the plaintiff, without giving any signal to stop the train or attempting to use the lever on the other side from the ground, or even reporting to the conductor or receiving any other order from him, of his own volition, without even giving notice to any one in control of the motion of the train of his intention, attempted the perilous feat, of stooping over



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from the moving car and pulling the lever below him. There is no ground for saying the order of the conductor required or contemplated such peril. Without doubt, when an order is given, it is the duty of the servant to take the safe way of carrying it out, if one is provided; and if that fails, he cannot, except, perhaps, in cases of emergency arise from the fault of the master, charge the master with the result of using a dangerous method not in the purview of the order. If the order of the conductor could in any reasonable view be regarded as suggesting to the plaintiff to stand on the flat car and uncouple from that position, then there might be ground for saying that the defendant could not escape liability for a condition of things produced by its order to him, in which on a sudden impulse he took a dangerous course, resulting in his injury. But it would be beyond all reason to say the order contemplated mounting the flat car as the plaintiff did, with the intention of stepping or leaping from that to the following car, in order to apply the brakes to that car, or attempt to use the lever while stooping from the end of the flat car. Here was a general order from the conductor to uncouple, and here was a lever provided for the purpose to be used from the ground, and if it had been used as intended by the defendant, the plaintiff could not have been injured by falling from the car. This distinguishes the case from *Carson v. Railway*, 68 S. C. 55, 68, 46 S. E. 525; for in that case the court said: "It was shown, or rather there was testimony offered tending to show, that the conductor ordered this servant, the plaintiff, to couple those cars; that such conductor in this matter represented the master; that the servant called to such conductor to hold fast the train until he signaled; that this servant did not signal the conductor to move the train; that it was under these circumstances the train was moved so that the two cars bumped against each other, thus causing his injuries; that when the cotter pin was out of its place, it would be necessary for a servant to go between the cars to arrange it; that it was necessary to go between the cars to open the instrument by which the coupling was made."

The conductor's position at the time of the accident does not appear from the evidence, and therefore there could be no finding of negligence on the ground that he was not present to direct the details of the uncoupling and the movements of the train. The plaintiff's testimony shows that he clearly understood the manner in which the lever was to be used, without any instruction or direction. That the master is not liable for any injury which results from the use of a safe appliance in an unsafe and dangerous manner not contemplated by him, seems too obvious to require a particular citation of authority. The cases will be found collected in 20 Am. & Eng. Ency. 141. No authority has been cited, and we think there is no foundation in reason for the proposition that though the plaintiff knew fully the safe and proper way to use this safe appliance, it was,

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nevertheless, the duty of the conductor to stand by him and see that whenever ordered to uncouple cars, the plaintiff should use with due care the safe means provided, and should not take the peril of an improper use of such means. The evidence of the plaintiff shows beyond doubt that he knew the safe way, and chose the dangerous.

2. The plaintiff further charged: "That the said defendant was further negligent, careless, and reckless in that the said engineer in charge of the said engine, who was a superior officer and agent to the said plaintiff, and who had the right to direct the services of the said plaintiff, and who was in charge of the said train in the absence of the said conductor, gave the said train a sudden and violent lurch and start forward, without warning to the said plaintiff or signal from him, and while the said plaintiff was engaged in carrying out the directions and orders of the said defendant, and was in a dangerous position, which negligence, carelessness, and recklessness was a direct and proximate cause of the said injuries." The general rule in this state and elsewhere is that an engineer is not ordinarily the representative of the master, but is the fellow servant of the train hands—all being under the orders of the conductor, as the representative of the master. The plaintiff in this instance testified, however, that at the time of his employment as a flagman, he was told by the trainmaster that he must obey the orders of the conductor or the engineer, and that accordingly he did obey, to use his own words, "the conductor when he needed my services and the engineer when he needed my services." The Constitution provides: "Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation or its employees as are allowed by the law to other persons by law who are not employees, when the injury results from the negligence of a superior agent or officer, or a person having a right to direct or control the services of a party injured, and also when the injury results from negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about another piece of work."

Under this constitutional provision, in view of the plaintiff's evidence as to obeying the orders of the engineer, the question arises, whether in this case the engineer was a superior agent, or officer, or person having the right to control or direct the services of the plaintiff. Under a constitutional provision identical with ours, the Supreme Court of Mississippi held an engineer not to be a person having the right to control or direct the services of a brakeman. *Evans v. Railway* (Miss.) 12 South. 581. In this state, the rule adopted is thus clearly stated in *Brabham v. Tel. Co.*, 71 S. C. 56, 50 S. E. 716, and is quoted and approved in *Martin v. Royster Guano Co.*, 72 S. C. 237, 243, 51 S. E. 680, 682: "In determining who are

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fellow servants, the test of rule in this state is not whether the servants are of a different grade, rank or authority, one of them having the power to control and direct the services of the other, but the test is in the character of the act being performed by the offending servant, whether it was the performance of some duty the master owed to the injured servant, the performance of which duty the master had intrusted to the offending servant. In the case under consideration, there was no duty resting upon the defendant to give notice to the plaintiff, as the danger was not hidden or unusual, and the plaintiff had knowledge thereof." Assuming that the engineer was the offending servant, through whose negligence the plaintiff was injured, the whole evidence shows that, in accordance with the well understood custom, the master had intrusted to the conductor, and not the engineer, the duty of giving orders for the shifting and coupling of the cars, and there was no evidence that the conductor was absent and the train was in charge of the engineer. Therefore, in carrying out the conductor's orders, the plaintiff was not at the time under the engineer, as a person having the right to direct or control his services, but was under the conductor, and hence was a fellow servant of the engineer on the same train. But, in addition to this, we do not see how negligence can be imputed to the engineer as the proximate cause of the injury. The plaintiff, it is true, testified he fell on account of a sudden jerk of the train, but jerks are inevitable and are to be expected in movements of freight trains (*Steele v. R. R. Co.*, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756), and there is nothing in the evidence indicating the engineer had any reason to suspect the plaintiff was attempting to uncouple the cars while stooping over the corner of a moving car, or in any other position of danger. If the plaintiff had been on the side of the train uncoupling the car by the use of the lever from the ground, it would have been impossible for a sudden jerk to have precipitated him from the car under the wheels.

3. Another specification of negligence alleged as a proximate cause of the injury was a failure to have a sufficient number of cars "equipped with power-driving wheel brakes and appliances, commonly known as 'air brakes,' as is required by law, and have air properly working for the operation of said brakes on said cars."

The sections of the federal statute relating to interstate trains on which this allegation of negligence rests are as follows:

"Section 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic after said date has not a sufficient number of cars in it so equipped with power or train brakes that

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the engineer on the locomotive drawing such train can control its speed without requiring the brakeman to use the common hand-brake for that purpose.

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such carrier to haul or permit to be hauled or used on any of its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars.

"Sec. 3. That any employee of such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174].

This statute was amended in 1903; section 2 of the amendment being: "That whenever as provided in said act any train is provided with power air brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and to more fully carry into effect the objects of the said act, the Interstate Commerce Commission may, from time to time after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and the failure to comply with any such requirement of the said Interstate Commission shall be subject to the like penalty as failure to comply with any requirement of this section." [U. S. Comp. St. Supp. 1905, p. 603].

This last section is the one germane to this discussion. Construing the original statute and the amendment together, it seems manifest under the amendment that Congress meant to establish the rule that railroads would comply with the provision of section 1 of the original act requiring the train to be under the control of the air brakes operated by the engineer of the locomotive, and would not be liable under this act, if they had 50 per cent. of the cars equipped with power brakes used in operating by the engineer from the locomotive and all other cars on the same train and associated with these cars which might have been equipped with power brakes also under like control of the engineer. The statute does not require all cars which may be equipped with power brakes to be coupled or associated together but only 50 per cent. of such cars, but it does require all that may have been equipped with power brakes and actually associated with 50 per cent. to be controlled by the engineer from the locomotive. The statute contemplates

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and allows that there may be cars in the train equipped with air brakes and not associated with the 50 per cent. operated from the engine. The word "associated," as here used, manifestly means the cars immediately connected with the 50 per cent. equipped with power brakes and operated from the engine; and those associated cars are also required to be operated from the engine. But the terms of the statute, not only fail to require all cars of the train to be equipped with air brakes operated from the engine, but impliedly excludes such requirement, by expressing the requirement that such cars when associated with the minimum number of cars shall be so equipped. The number of deaths and physical injuries of railroad employees in this country had become so appalling as to shock the sensibilities of all civilized people, and the object of this legislation was to require the railroads to use the means prescribed in the statute as a reasonable precaution against such casualties; and as has been shown with great force by Chief Justice Fuller, in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363: Courts should give the statutes a broad interpretation, having in view the beneficial object of the legislation. Nevertheless, the statute fixes 50 per cent. as the proportions of the cars required to be equipped with air brakes operated from the engine, and in the face of this provision the court would be going very far to hold it to be evidence of negligence under the statute not to have all the cars so equipped. On this train there was a dummy; that is, a car not equipped with brakes, somewhere near the middle of the train; and the evidence made an issue of the fact as to whether 50 per cent. of the cars of this train were so associated together as to have their brakes operated from the engine, as required by the statute.

If we assume, however, the defendant had not complied with the law, and 50 per cent. of the cars of the train were not so associated as to have the brakes operated from the engine, this omission to have 50 per cent. of the cars so operated had no connection with the plaintiff's fall and injury, for the train consisted of from 14 to 16 cars, and all but five of these were between the engine and the flat car from which plaintiff fell, so that if the brakes of the eight cars connected together immediately behind the engine had all been operated from the engine, the car which ran over plaintiff's leg would not have been included in the number. Hence the plaintiff's evidence that, if the car which he uncoupled had been equipped with air brakes working from the engine, it would have stopped from running on him after he fell by the automatic action of the brakes, the instant it was uncoupled, cannot avail him. The statute did not require this car to be operated from the engine because it was not associated with the 50 per cent. required to be so operated, and the failure to have the eight associated cars next to the engine so operated had no connection with the accident. The presence of air brakes operated from the engine could not have



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prevented the accident, and the absence of such equipment on these cars could have contributed nothing to it. Aside from the statute, however, there was evidence that the safe and proper place for a dummy was at the rear of the train next to the cab, and that if it had been so placed, the air brakes on the car uncoupled by the plaintiff would have worked automatically so as to bring it to an almost instant stop, and thus probably prevented it from running over plaintiff when he uncoupled it and fell. If full credence and force be given to this evidence as tending to show that there was negligence on the part of the defendant in the management and arrangement of its cars and that such negligence was a proximate cause of the injury, the facts as stated by the plaintiff himself admit of no other inference than that his own negligence contributed to the injury as a proximate cause, without which it could not have been received. Knowing the cars to be arranged as they were, that hardly anything short of a miracle could save him from injury, if he fell between the moving cars; that it would be impossible for him to be so injured if he uncoupled by using the lever from the ground; he balanced himself in a stooping posture on the corner of the moving flat car and uncoupled by reaching down to the lever. No reasonable man could fail to see the extreme peril, or doubt that it was extreme negligence to take it; and it is too plain for difference of opinion that the negligence contributed to the injury as a proximate cause and that without it the injury would have been received. Taking the view of the evidence most favorable to the plaintiff, it cannot be doubted the facts conclusively show contributory negligence, and, therefore, under the principles laid down in *Jarrell v. Railway*, 58 S. C. 491, 36 S. E. 910, and *Cooper v. Railway*, 69 S. C. 480, 48 S. E. 458, the plaintiff could not recover.

4. Another ground on which responsibility for the injury was imputed to the defendant was set out in the twelfth paragraph of the complaint: "That the said duties and work assigned to the plaintiff on the occasion above described were not those plaintiff was ordinarily required to do in the scope of his employment as a flagman, but were unusual and out of the ordinary duties of his employment, which, on the occasion in question, he was required to perform by the said defendant." The plaintiff testified he contracted to work as a flagman, his ordinary duties being to protect the rear of the train, to see that the lantern and flags were placed, and the torpedoes and fusees were kept and used when needed, and to keep the cab clean; but he also testified that when he was employed he was charged by the train master to obey the conductor or the engineer, and he regarded it within the scope of his employment to perform other labor, such as unloading freight and uncoupling cars, when so directed by the conductor. It is clear from the evidence that in uncoupling cars the plaintiff was not acting within the scope of the duties he had contracted to perform without



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directions from the conductor, but it is also clear he was acting within the scope of his duties he had undertaken when directed by the conductor to perform them. The general rule is well established that the servant does not take upon himself risks which he would not reasonably expect to encounter because not within the scope of his contract of hiring. But, in order for this rule to be available, it must be shown that the servant was transferred to essentially new duties, and that the order under which he acted was negligent. This is the view presented in *Labatt on Master & Servant*, § 465, and it will be found very difficult to state a more accurate test, for from the nature of the subject each case must be decided on its own facts, whether the service required was essentially new, and whether the order given was negligent, are ordinarily questions of fact to be decided by the jury. But there are cases, and we think this one of them, where it cannot be said there was any testimony upon which a finding could rest that the duty of uncoupling a car was essentially new, and not within the capacity of the plaintiff, and not contemplated by his employment. The plaintiff had been employed on the freight train about three months and for some time before had been on the railroad bridge force; and his testimony already quoted shows that he had full knowledge of the purpose for which the lever was provided and that he used it in a way not contemplated by the company in placing it or by the conductor in giving his order; and the great and necessary danger of the method of use adopted by the plaintiff could not fail to be obvious to any reasonable man.

The conclusion is irresistible that the plaintiff's injury was due, if not solely to his negligence, certainly to his contributory negligence, in taking unnecessary hazards to carry out the orders of the conductor. We do not deem it necessary to refer separately to the errors alleged in the charge and in the admission of the testimony, as the foregoing discussion practically disposes of all the material questions made in the case which arose on either motion for nonsuit or for a new trial.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

GARY, A. J. (dissenting). While there was testimony tending to show that plaintiff was negligent, it likewise tended to prove negligence on the part of the defendant in several particulars. The testimony was susceptible of more than one inference; therefore it cannot be said as a matter of law that the negligence of the plaintiff was the proximate cause of injury; and the inference to be drawn from the testimony was properly submitted to the jury, especially when it appeared that the plaintiff did not have time for deliberation in executing the order to uncouple the cars.

BRITT *v.* CAROLINA NORTHERN R. CO. *et al.*

(Supreme Court of North Carolina, April 3, 1907.)

[56 S. E. Rep. 910.]

**Master and Servant—Injuries to Servant—Question for Jury.\***—In an action against a railroad for personal injuries to one employed by a receiver of the railroad company and a lumber company, evidence held to present a question for the jury, whether plaintiff was an employee of the railroad, or only of the lumber company.

**Same—Defective Appliances.**—In an action for injuries to an employee of a railroad company in loading a car with logs, evidence held to present a question for the jury whether the appliances furnished for the work were defective.

**Same—Relation of Parties.\***—Where a railroad company delegated its duty of loading a car to a lumber company making a shipment, it is liable for any injury to its own employee caused by negligence of the employees of the lumber company in loading the car.

**Same—Fellow Servants—Statutory Provision.**—Under the express provisions of Revisal 1905, § 2646, any servant of a railroad company suffering injury by the negligence of any other servant of the company is entitled to maintain his action against the company.

**Same—Concurrent Negligence.†**—Where a servant of a railroad company was injured in loading logs upon a car by reason of a defective chain furnished for the work and the negligence of a driver furnished by the lumber company making the shipment in starting up his team suddenly and without warning, the railroad company is liable for the injury.

**Same—Assumption of Risk.‡**—Where a servant of a railroad company notified the company of the defective condition of a chain used in loading logs on cars, and was promised that the defect would be remedied, and, relying on the promise, remained in the service, he did not assume the risk of injury, though he would not be entitled to recover, if he was guilty of contributory negligence.

Appeal from Superior Court, Robeson County; Councill, Judge.

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\*For the authorities in this series on the question who are, and are not, employees of a railroad company, see foot-notes appended to *Southern Ry. Co. v. Chambers* (Ga.), 21 R. R. R. 563, 44 Am. & Eng. R. Cas., N. S., 563; *O'Donnell v. Kansas City, etc., R. Co.* (Mo.), 21 R. R. R. 542, 44 Am. & Eng. R. Cas., N. S., 542; *McColligan v. Pennsylvania R. Co.* (Pa.), 20 R. R. R. 427, 43 Am. & Eng. R. Cas., N. S., 427; foot-notes appended to *Wiest v. Coal Creek R. Co.* (Wash.), 20 R. R. R. 398, 43 Am. & Eng. R. Cas., N. S., 398.

†See foot-notes appended to *Chicago & E. I. R. Co. v. Kimmel* (Ill.), 21 R. R. R. 384, 44 Am. & Eng. R. Cas., N. S., 384; foot-note appended to *Moore v. St. Louis Transit Co.* (Mo.), 20 R. R. R. 444, 43 Am. & Eng. R. Cas., N. S., 444.

‡See foot-notes appended to *Cincinnati, etc., Ry. Co. v. Robertson* (C. C. A.), 17 R. R. R. 324, 30 Am. & Eng. R. Cas., N. S., 324.

**Britt v. Carolina Northern R. Co**

Action by O. M. Britt against the Carolina Northern Railroad Company and another. From a judgment in favor of defendants, plaintiff appeals. Reversed, and new trial ordered.

The plaintiff sues the defendant company, in the hands of a receiver, for damages for injuries alleged to have been sustained, while in its employment, by reason of defective ways, furnished in discharge of his duty, and negligence of its employees. The defendant was at the time of the injury a corporation, operating a railroad between Lumberton, N. C., and Marion, S. C. Prior to the time of the injury defendant's property had, by order of the Circuit Court of the United States, been placed in the hands of W. J. Edwards, receiver, who was, pursuant to said orders, operating said road. Plaintiff alleged that at the time of said injuries he was in the employment of said corporation, under the control and direction of said receiver; that, among other duties assigned to him, he was required to aid in loading the cars of said railroad; that on the day of said injury one of the flat cars of said corporation attached to an engine and other cars was upon the track of defendant for the purpose of being loaded with logs, the property of the Southern Saw Mill Company, for transportation; that the usual and proper manner of loading the car was to place skids—one end resting on the side of such car, and the other end on the ground or embankment on the side of the track; that the logs lying on the ground or placed on the embankment, were drawn over the skids, up to and on the car by means of iron chains—one end of which was put around the log, and the other end carried over the car and to the opposite side, when mules, hitched to the chains, pulled the log up on the car. The complaint describes the manner in which the logs were usually and by a safe method drawn up on the car, the adjustment of the chain, etc., and alleged that the manner in which the chains were adjusted by defendant at the time he sustained the injury was unusual, unsafe, and dangerous; that prior to the day of the injury he had frequently notified defendant's superintendent that the manner in which chains were adjusted, and the logs drawn up on the car, was unsafe and dangerous, and that said superintendent had promised to furnish proper chains for said purpose; that on the day of the injury plaintiff was in the discharge of his duty, aiding in loading the car, when, by reason of the defective and dangerous method of adjusting the chain, and the sudden and unannounced movement of the mules, under the direction of the driver, the log fell from the skid and injured plaintiff; that the driver of the mules was an employee of defendant—being one of a loading crew furnished for that purpose. Plaintiff further alleges that "the immediate and proximate cause of his injury was the failure of the defendant to provide a safe appliance and double chains, with which to do said work, although demanded of defendant, and its failure in the conduct of the work to observe ordinary care and prudence in starting the train of mules with-

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out notice or warning, to pulling at the log, which fell upon plaintiff," etc. Plaintiff set forth for a second cause of action substantially the same allegations, except that he averred that the drivers of the mules and himself were in the joint employment of the sawmill and the defendant, and that if the defendant had furnished a double chain with which to have done the work, he would not have been injured, notwithstanding the sudden driving of the mules, etc. The defendant denied all of the material allegations of the several causes of action set forth in the complaint. Appropriate issues were submitted to the jury. At the conclusion of the testimony, his honor, upon defendant's motion, directed judgment of nonsuit. Plaintiff excepted, and appealed.

*McIntyre & Lawrence, E. M. Britt, R. E. Lee, and Iredell Meares*, for appellant.

*McLean, McLean & McCormick*, for appellees.

CONNOR. J. The plaintiff's appeal calls into question his honor's opinion that there was no evidence fit to be submitted to the jury upon which a finding could be predicated in his favor. The first proposition which plaintiff must make good is that at the time of the injury he was in the employment of the defendant. If he has failed in producing evidence proper to go to the jury, tending to sustain this position, he must fail in his action. In this regard the testimony, which for this turn we must take to be true, is that both the defendant railroad company and the Southern Saw Mills Lumber Company, a corporation, engaged in cutting, sawing, and shipping logs, were in the hands of W. J. Edwards, as receiver; that the lumber company shipped its logs over the defendant road, loading them on cars in substantially the manner described; that one McNeely was in the employment of the receiver or superintendent of the defendant railroad company. Plaintiff testified: "In February, 1904, I was working on a log train of the defendant company; was conductor of a log train; had been about three months. I was assigned or put in charge of this train as conductor by Mr. McNeely, who was at that time the general superintendent of the defendant company. Mr. McNeely told me to take the log train and run it to the best advantage of the road and the mill, to see that logs were loaded and unloaded, to collect passenger fares, and to see that no one rode on the train except the train crew unless they paid fare. Directions were given me by McNeely as to the movement and operation of the train, etc. He also gave me timetables of schedules, and told me to be careful to avoid collision with other trains, etc. \* \* \* The local conductor and engineer were under my control. The movement of trains was directed by me. \* \* \* Mr. Edwards told me that he expected me to help load the logs on the cars, and that, however well he liked me, if I did not do this, he would get some one in my place who would do this work. This conversation or instruction



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from Mr. Edwards occurred while I was operating the train, and put in charge of it as conductor. \* \* \*” The plaintiff upon cross-examination said: “I went to Kingsdale in May, 1899, accepted employment with the Southern Saw Mills—Mr. King was in charge. Remained there under several superintendents until Mr. Edwards took charge as receiver in spring of 1903. Did practically the same work under all the superintendents. After Mr. Edwards took charge, until November, 1903, my work was regularly in the woods examining timber. Can’t tell who paid me for my services. Went to the office and got my pay, but do not know who paid it—who furnished it. Think my name was on the pay roll of the mills to the time of injury. Won’t swear that my name was ever on the pay roll of defendant company. The wages were paid me at office of the mill; this was after Edwards was appointed receiver. Was hurt in the afternoon after dinner. The logging force had been there from early morning. Did not go down with train in the morning—don’t know what conductor did.” There was much other testimony from plaintiff upon the question of employment, some of which tended to sustain, and some to contradict, his contention. It is manifest that some confusion in regard to his relation to the two corporations grows out of the fact that Mr. Edwards was receiver of both and operating both. It does not appear what, if any, relation they bore to each other. The plaintiff says that Mr. Edwards told him that the reason why he wished him so serve the defendant company in the manner testified to was “to save expense.”

While the payment of, or promise to pay, wages, in consideration of services rendered, establishes the relation of employer and employee, other considerations may be sufficient, as if A. employs B. to serve himself and another; the fact that A. pays the entire wages will not necessarily prevent the other from being, in respect to the service rendered, the employer or master of B. The theory of the plaintiff is that Edwards, being the receiver of both corporations, employed or retained him in the services of the lumber mill with the agreement between Edwards and himself that, in addition to his services to the mill, he should, when so directed by the receiver, serve the defendant company; that, pursuant to this agreement, he rendered the service as described by him, and was under contract obligation to help load the car. Mr. Edwards, as receiver of both corporations, had the power to make such a contract, and it was prudent for him to do so “to save expense.” The adjustment of the wages between the two corporations, for which he was receiver, may well have been left to him. It did not concern plaintiff, if he was willing to render the service to both corporations, as he says he did. In *Rouke v. White Moss Coll Co.*, L. R. 2 C. P. Div. (1877) 205, Cockburn, C. J., says: “Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man

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to whom he is lent, although he remains the general servant of the person who lent him." The principal is well stated by Miller, C. J., in *Vary v. B. C., etc., R. R., Iowa*, 246: "A person may be the general servant of one, and the special servant of another; that is, he may perform special services for one, while he is the general servant of another, and, while performing such special service, he will be the servant of the one for whom such services are performed, as to that particular service." It is true that there both companies paid the plaintiff. It is not suggested, however, this fact was, by any means, controlling in fixing the relation of the parties. It is clear that Edwards, receiver of the mills, would have had no right to require the plaintiff, by reason of his contract to serve the mills, to serve the defendant as conductor, etc., without his (plaintiff's) consent. When plaintiff consented to do so, he became, by virtue of that contract, quoad that service, the servant of the defendant company. He did not thereby become the joint servant of the two companies, but, rather, contracted with Edwards, receiver of the defendant company, that he would serve defendant as conductor, etc. In the case cited, the court says that if the contract was for joint service, the servant has his election to sue either. The theory of the defendant is that the mills, for the purpose of unloading its logs on defendant's car, furnished the "loading crew" and appliances, and that plaintiff, as the employee of the mills, was present aiding in the work; that defendant took no part in loading the car, leaving it entirely to the mills. If this be the correct interpretation of the testimony, the plaintiff must fail in his action. The testimony of the plaintiff is not so clear that the court may say, as a matter of law, what is the truth of the controversy. It is a question for the jury under proper instructions by the court. Certainly more than one inference may be drawn from the evidence. As we interpret the complaint there is no allegation of a joint service. The plaintiff rests his case upon the theory that quoad the service rendered, he was the employee of defendant company. Assuming, for the purpose of further considering the appeal, that plaintiff's allegation that he was the employee of defendant is sustained, we proceed to inquire whether there was any evidence fit to be submitted to the jury, tending to show a breach of duty on the part of defendant. That it is the duty of an employer to furnish to the employee reasonable safe ways and appliances with which he is employed is too well settled to require or justify the citation of authority, and is conceded by the learned counsel for defendant.

There is evidence tending to show that the chain furnished for loading the car was not safe, and not such as was in general use by railroads for that purpose, and that plaintiff had notified defendant's superintendent thereof, and that he had promised to furnish him other chains. Plaintiff testified: "Mr. Edwards told me that Mr. McNeely would give me instructions, and if anything was needed, Mr. McNeely would get it for me."

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This was while I was working on the train, some time in the latter part of 1903. This was the last of the two conversations I had with Mr. Edwards. After I began service of this train, I found that we needed more chains to load logs—also wrapping chains. I asked him to furnish them, and he agreed to do so. Some time after this, I went to see him, inquired if the chains had come, and he told me he had not ordered them, but would order for me to get two links of the side chain wanted; bring to his office, and he would get chains. I did this, and he said he would have chain in a very short time; for me to work on until the chain came. I told him what I wanted with chain, and how I wanted to make my loading chain.” Here witness explained model and illustrated how he was hurt. The model was used in the argument before us, illustrating the manner in which logs were loaded on flat cars, and the alleged defect in the adjustment of the chain. Plaintiff also testified that he knew what kind of chains are in general use by railroads for loading logs. He explained to the jury the manner in which the work was done. We think that the testimony in this aspect of the case entitled the plaintiff to have the issue upon the question of defective or unsafe ways, etc., submitted to the jury. The defendant insists, however, that, assuming this to be true, the plaintiff is not entitled to recover, because, upon his own testimony, such defective ways, etc., were not the proximate cause of his injury. That the negligent driving of the mules while one end of the log was off the skid was the cause of the injury. It appears that the mules had stopped, and, under the method used in controlling their movement, the driver should have waited for the signal from a man who stood on the flat car. The plaintiff was standing on the ground by the side of the skid for the purpose of watching, and, if necessary, keeping the logs straight on the skids. In this aspect of the case, plaintiff testified: “I don’t remember hearing the driver tell the train to start up, but think he did, and started up train unbeknowing to me. That is what snatched the log off. If the team had stood still until I straightened the log, why then it would have went on all right without any damage. The log falling off was due to a single chain. It would not have gone on the car until it was straightened. After the log was in the shape it was, after putting one end ahead of the other, the team was stopped, and I was making the attempt to straighten the log. If the driver hadn’t started the team, I could have straightened the log all right, and it would have no doubt gone on the car after it had been properly straightened on the skids; that is what I was there for.”

In reply to a question of the court, after explaining the situation of the log, the plaintiff said: “That the driver starting unexpectedly was the cause of the accident.” Defendant insists that upon this testimony the proximate cause of the injury was the action of the driver in starting the mules without warning, thereby throwing the log upon plaintiff. Conceding that

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plaintiff was in defendant's employment, and that the chains furnished him for loading were not such as were in general use, and that, at the moment preceding the injury, the log, by reason of the defect in the chain, was not straight on the skids, and that plaintiff, in the discharge of his duty, was in the act of straightening it so that it would have gone on the car in safety, it insists that an independent cause intervened and produced the result; that is, moved the log, throwing it from the skids, and causing it to fall upon the plaintiff. This contention presents an interesting question, in the solution of which other phases of the testimony must be noted. The plaintiff, to meet this contention, says that the driver was also in the employment of the defendant company, and that, being a fellow servant, the defendant is responsible for his negligence. We do not discover any evidence tending to show that the driver was in the service of defendant, otherwise than as the employee of the mills. The case then comes to this: The defendant, owing to the public the duty of receiving and transporting freight, places a car upon its track at a place, and in a position, to receive logs from the lumber mills for shipment; the defendant furnishes the chains, and directs the plaintiff, its employee, to aid in loading the car; the lumber mills furnish the mules and driver to perform the duty assigned to them in the work. The duty is imposed upon the defendant to receive the logs for shipment, and this, we think, includes the duty of loading them upon the car. So far as it affected its employees, it was its duty to provide reasonable safe ways and appliances, and to adopt safe methods for doing the work. If, instead of loading the cars, the defendant permitted the shipper to do so, it assumed a responsibility to its employees that the shipper would likewise use safe ways, etc. We had occasion to consider this question in *Wallace v. Railroad*, 141 N. C. 646, page 661, 54 S. E. 399, 404, where we said: "If the defendant permits its shipper to load its car, it is as much, and in the same degree, liable for an injury sustained by its servant by negligence on the part of the shipper as if its own servant had loaded it." The case, in this respect, may be likened to those in which a railroad corporation has leased its property, wherein it is uniformly held that the corporation is liable for injuries sustained by the negligent operation of the property by the lessee. *Smith, C. J., in Aycock v. Railroad*, 89 N. C. 321, says: "The defendant company leasing the use of its road or permitting the use of it by another company, remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter, and the injury thence resulting, to the same extent as if such mismanagement was the act or neglect of its own servant, operating its own train." This principle has been enforced in numerous cases by this court. *Logan v. Railroad*, 116 N. C. 940, 21 S. E. 959; *Phelps v. Steamboat Co.*, 131 N. C. 12, 42 S. E. 335. A number of cases illustrating the principle are collected in the notes to 2 *Labatt, Master & Serv.* 1618: "If a person employs

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another to perform a duty which he would have to discharge, if another were not employed to do it for him, as to that service, stands in the master's stead with relation to other persons." *Moore v. Wabash & St. Louis R. R.*, 85 Mo. 588; *No. Pac. R. R. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994.

The doctrine is thus stated by Justice Field, in *Railroad Co. v. Herbert*, 116 U. S. 647, 6 Sup. Ct. 593, 29 L. Ed. 755: "It is well settled that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant, so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery, or other instruments with which he is to work. His contract implies that, in regard to these matters, his employer will make adequate provision that no danger shall ensue to him." Again it is said: "A servant may expect that his master will not surround him with dangerous agencies, or expose him to their operation, whether they are in charge of the master's servants or of an independent contractor." *Toledo B. & M. Co. v. Bosch*, 101 Fed. 530, 41 C. C. A. 482; *Pullman Pal. Car Co. v. Laack*, 32 N. E. 285, 143 Ill. 242, 18 L. R. A. 215. The conclusion to which all of the authorities supported by reason brings us is this: The defendant owed to the lumber mills the duty of receiving, at such convenient place as it might designate, the logs and loading them upon its car for shipment. It owed to the plaintiff, when directed in the course of his employment to aid in the loading, the duty to furnish safe ways, appliances and careful co-employees. If this duty to load the car was delegated to another, and the plaintiff directed to aid in the work, the defendant remained liable for the negligence of such other person in the same manner as if it had sent its own servants to do the work. So far as the duty of the defendant to the plaintiff is concerned, in respect to furnishing safe ways, appliances, and co-employees, to aid in the work, the lumber mills and its employees were the servants of the defendant. *Allison v. R. R. Co.*, 64 N. C. 382. The plaintiff and the driver of the mules were therefore engaged in a common employment in loading the car. This results not from any contract relation between the driver and the defendant, but from the relation of employer and employee between the lumber mills and the driver, and the undertaking by the mills, either by permission or pursuant to contract with the defendant to load the cars. This being so, the negligence of the driver is imputed to the defendant, in so far as it brought injury to the plaintiff. We do not



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deem it very material to inquire whether the lumber mills was, in loading the car, an independent contractor or was the employee of the defendant, or acting simply by its permission. The result of its negligence, so far as the plaintiff is concerned, is the same. In no aspect of the case can the defendant escape liability upon the doctrine of the nonliability for the negligence of a fellow servant. Revisal 1905, § 2646. We are thus brought to an examination of the contention of the defendant, that the proximate cause of the plaintiff's injury was not the defective ways (chain), but the negligence of the driver in starting the mules. The principle invoked by defendant is recognized and uniformly enforced. It is well stated in *Harton v. Telephone Co.*, 141 N. C. 455, 54 S. E. 299. When the original negligence is insulated from the injury by the intervention of some independent, efficient agency, such agency will be deemed the proximate cause of the injury. The difficulty confronting the defendant consists in the necessity that the intervening agent be independent; that is, not related to the defendant or its negligence, whereas here, as we have seen, the negligence of the driver is imputed to the defendant—is its negligence. The essential element of independence is not only absent, but the negligence of the driver combined with the first negligence of defendant, and by such combination focalized the two negligent acts, and became the efficient cause of the plaintiff's injury. One breach of duty resulted in placing the log in a dangerous position, and while the plaintiff was endeavoring in the discharge of his duty to straighten the log upon the skids, another negligent act of defendant threw it upon him. The case does not come within the principle invoked by defendant. The act of the driver causing the mules to start was not that of an independent agent. We are of the opinion that the case is otherwise distinguished from *Harton's Case*, *supra*, in that the negligence of the defendant, resulting in placing the log in a dangerous position, had not expended its force; it was at the moment a menace to the plaintiff, and the act of a driver was not the intervening efficient cause of the injury—it was concurrent with the first cause. The two causes concurred combining or focalizing into one proximate cause producing the result.

It is not necessary to discuss this phase of the case. Defendant insists that plaintiff is barred of a recovery, because he continued to use the chain with knowledge of its unfitness for the service. It is well settled that where the servant notifies the employer of the defective condition of the appliance, and he promises to remedy such defect, the servant, relying upon such promise, may remain in the service, using such appliance, without assuming the risk of injury in its proper use. The defect imposes upon the servant the duty to exercise due care in the use of the appliance, having regard to its defective condition. As has been frequently said by us, while the servant does not in such cases assume the risk, if he is guilty of contributory neg-



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ligence in the use of the appliance, he cannot recover. *Pressly v. Yarn Mills*, 138 N. C. 410, 51 S. E. 69, where the authorities are collected and commented upon. This defense is open to defendant, as modified by the decisions in *Greenlee v. Railroad*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, and *Troxler v. Railroad*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580. As the motion for judgment of nonsuit was based upon the plaintiff's evidence, the judgment granting the motion does not indicate upon what aspect of the testimony his honor was of the opinion that plaintiff was not entitled to maintain his action. This condition of the record, together with the range of the arguments, makes it necessary to consider the testimony in all of the aspects of the case. We have, as the motion to nonsuit necessitates, treated the testimony as true, and given the plaintiff the benefit of that view of it most favorable to his contention. It is proper to say that there is to be found in his testimony grounds for other inferences favorable to defendant's contention. These were not open to us in reviewing the judgment of nonsuit.

We are of the opinion that for the reasons stated, the testimony, as it bore upon the several issues raised by the pleadings, should have been submitted to the jury under proper instructions by the court. To that end, there must be a new trial.

ILLINOIS CENT. R. CO. v. TIMMONS *et al.*

(Court of Appeals of Kentucky, March 15, 1907.)

[100 S. W. Rep. 337.]

**Master and Servant—Injuries to Servant—Relation of Parties.\*—**Where plaintiff was employed frequently during a year preceding his injury by a foreman of the defendant railroad company, and was paid a part of the time by the foreman personally and part of the time was placed on the pay roll, he was in the employ of the railroad company, so that it owed to him the duty of a master.

Appeal from Circuit Court, Lyon County.

"Not to be officially reported."

Action by Shirley Timmons against the Illinois Central Railroad Company and another. From a judgment in favor of plaintiff, defendant railroad company appeals. Affirmed.

*Trabue, Doolan & Cox, Darby & Gates, E. H. Jones, and J. M. Dickerson*, for appellant.

*Hendrick & Miller*, for appellees.

NUNN, J. This appeal is from a judgment of \$600 in favor of appellee for injuries received by the negligence of appellant's

\*See preceding case, and foot-notes.

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servant, superior in authority to him, while in the alleged employment of appellant. Appellee was injured while aiding in cleaning out a boiler belonging to appellant, situated at or near its bridge on the Cumberland river. His injuries were very severe. He was scalded from his hips down to and including his feet. The amount of the verdict is small, and hardly sufficient to compensate him for his injuries and mental physical suffering. The evidence was conflicting on the questions as to whether or not the appellee was in the employment of appellant, and as to contributory negligence on his part. These questions were submitted to the jury, and it found against appellant on both propositions.

The main question upon which appellant asks a reversal is whether or not the person who employed appellee to help clean the boiler had the authority in the matter to act for appellant. The appellant contends that he did not. The testimony introduced upon this point, in substance, is as follows: J. B. Chandler, who was a defendant in this action, and against whom a joint judgment was rendered with the Illinois Central Railroad Company, was the foreman of appellant, and engaged the services of appellee frequently during the year next preceding the date on which he was injured. For some time after he first employed appellee to work on the bridge, and other work connected therewith, Chandler paid him personally, and for two months of the time appellee received his pay from the pay car of appellant, and after that, to the time of his injury, he was paid by Chandler, as first stated. Chandler testified that he did not have authority to employ appellee, and also stated that he did not employ him on the day he was injured. Appellee testified that he was employed by the defendant J. B. Chandler to do all the labor he performed for appellant during the year mentioned, and the manner of employment was the same when Chandler paid him as when he was paid from the pay car, and that he was engaged the afternoon before his injury to keep watch on the bridge, which he did to the hour of midnight, and was then engaged for the next day, and was aiding in the cleaning of the boiler, under the directions of the foreman, Chandler. He stated that he was about 20 years old; that he had no experience in cleaning boilers, but when he went to the end of it, where the "manhead" is situated, it appeared to him that there was too much steam for it to be safe to do the work then, and he called Chandler's attention to that fact; and after waiting a short time Chandler stated that it was all right and safe now to do it, and, handing him a iron bar, told him to punch the "manhead" out, which he did, receiving the injuries as stated.

As stated, the only direct testimony given on the authority of Chandler to engage the services of appellant was given by himself; but he did not deny the statement of appellee that he had employed him upon several occasions, and that he was employed during the previous year, and it appears that appellant

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company knew of it, and ratified his employment by placing his name upon the pay roll. It further appears, without contradiction, that Chandler was a foreman, and in complete charge of the bridge and pumping house of appellant, and, if he did not have the authority to employ assistance when needed, no one else did. In the case of *Newport News & Mississippi Valley Co. v. Carroll, etc.*, 31 S. W. 132, 17 Ky. Law Rep. 374, which was a case where a freight train stopped at a station for the purpose of taking out of the train two cars and placing them on a side track, on which one car was already standing, and while the same was being done, Smith, a minor, who happened to be present, attempted to couple the cars and was injured. He testified that the conductor told him to couple the cars, and in obedience to this order or request he attempted to do so, and was caught between the bumpers and severely injured. The conductor testified that he did not request or order Smith to do the work, and really did not desire the cars to be coupled. In that case the court said: "Appellant insists that it should have been shown to the jury that the conductor had authority from the company to employ Smith to do the work, else no recovery could be had, and complains that the court did not submit that question to the jury, but, as appellant claims, ruled that, as matter of law, the conductor had authority to employ Smith to render the services mentioned. We do not think that the court erred in that respect. It may be that, as between the railroad company and the conductor, he had no such authority; but, so far as third parties are concerned, his actions, orders, and employments in the management and conduct respecting the trains under his control must be held binding on the railroad company." If the company could be held responsible for the acts of the conductor in that case, certainly the company in this case should be held responsible for the conduct of Chandler, when he had the control and management of appellant's property at that point, and had employed appellee to perform labor for the appellant frequently before that time, with the knowledge and consent of the company, as shown by its placing his name upon the pay roll when employed by Chandler. See *L. & N. R. R. Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124.

For these reasons, the judgment of the lower court is affirmed.

CONNIFF *v.* LOUISVILLE, H. & ST. L. RY. CO.

(Court of Appeals of Kentucky, Feb. 27, 1907.)

[99 S. W. Rep. 1154.]

**Master and Servant—Injuries to Flagman—Negligence of Company—Lookout—Warning of Approach of Trains.**—Where the servant of a railroad company, employed as flagman at a street crossing, and whose duty it was to light each night and take away each morning certain switch lamps, received injuries, resulting in death, by being struck by one of defendant's trains while performing his duties in connection with the lights, the failure of the servants on such train to keep a lookout for the flagman or give him warning of the approach of such train was not negligence rendering it liable for the injuries received by him, since it was his duty to keep a watch for approaching trains, and the fact that he was injured while attending to his duties connected with the lamps did not impose upon the company a higher or different degree of care than it would be held to if his sole duty was that of flagman.

Appeal from Circuit Court, Jefferson County; Common Pleas Branch, Third Division.

"To be officially reported."

Action by Martin Conniff against the Louisville, Henderson & St. Louis Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

*Edwards & Ogden*, for appellant.

*Helm & Helm*, for appellee.

CARROLL, C. Martin Conniff was injured in November, 1904, by one of the trains of appellee at the intersection of Fourteenth and Delaware streets, in Louisville, Ky., and from the injuries thus received died several months afterwards. Previous to his death he instituted this action to recover damages for injuries received. After his death it was revived in the name of his administratrix, and upon a trial the jury returned a verdict in favor of appellee. The sole ground upon which a reversal is sought is the alleged error of the court in instructing the jury.

Conniff had been in the employ of the company as a flagman for some 15 years, and had been stationed at Fourteenth and Delaware streets about three years. His duties were to warn persons attempting to cross Fourteenth street of the approach of trains to the Delaware street crossing, and also to light each night and take away each morning switch lamps on a switch a few feet south of the crossing. The passenger train by which he was struck was backing north on Fourteenth street; the engine being attached to the south end of the train. Standing on the front platform of the passenger car was a switchman in the employ of

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the company, whose duty it was in approaching a crossing to sound an air whistle that could be heard several hundred feet away, and in cases demanding it to apply an emergency brake and bring the train to a sudden stop. The evidence shows that the train when it struck Conniff was going three or four miles an hour, and that Horn, the switchman, was at his place of duty on the platform, and sounded the whistle in the usual manner as he approached Delaware street. He testified that he saw Conniff when the train was about 150 feet distant take the lamp off of the stand, step to the side of the track, in a place of safety, and walk north towards the crossing a few feet away, and that just before he was struck by the steps of the passenger coach he left his place of safety by the side of the track, and walked close enough to the track to be struck. The court instructed the jury in substance that if the employees or any of them, of appellee, in charge of the train, saw Conniff in a place of peril from the moving train, and apparently unconscious of his danger, it was their duty to exercise ordinary care by the use of all means under their control to avoid injuring him, and that if they failed to do so, and by reason of such failure Conniff sustained the injuries complained of, the law is for the plaintiff. Counsel for appellant asked the court to instruct the jury that it was the duty of those in charge of the train to exercise ordinary care to avoid injury to Conniff, and to keep a lookout and give the usual and customary signals of its approach to the crossing; and, if the persons in charge of the train failed to exercise ordinary care to avoid injuring Conniff, or to keep a lookout, or give reasonable warning of its approach to Delaware street, and by reason of this failure upon their part Conniff was injured, they should find for the plaintiff.

The chief points of difference between the instructions given and the ones offered are that in the instructions offered appellant was held to the same degree of care that it owed to persons not in the employ of the company rightfully on or crossing the track, whilst in the ones given the company was not guilty of negligence unless the employees in charge of its train saw Conniff in a place of peril apparently unconscious of the danger, and, if so, it was their duty to exercise ordinary care to avoid injury to him. In *Coleman v. Pittsburg, C. & O. Ry. Co.*, 63 S. W. 39, 23 Ky. Law Rep. 401, Coleman, who was a crossing flagman, was struck and killed by a train at the crossing at which he was employed. The court held that the company did not owe Coleman any lookout duty, and was under no obligation to him to give warning of the approach of its trains, as it was his duty to observe the approach of all trains and to protect travelers at the crossing from injury. Counsel for appellant concede that under the authority of this case, if Conniff at the time he received the injury was in the actual discharge of his duties as a flagman watching the crossing, the instruction given by the trial court would be correct. They attempt, however, to distinguish this case from that upon the ground that Conniff under his employment performed two dis-

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tinct duties, and occupied two separate offices—that of flagman and custodian of the target lamp—and that as he was injured when attending to his duties connected with the target lamps, and not his duties in connection with watching the street, appellee owed him a different and higher degree of care than it would be held to if his sole duty was that of a flagman. Under the facts of this case we cannot make the distinction drawn by counsel. The duties of Conniff in connection with the switch lamps and as flagman are so intimately connected that they cannot be separated into two classes. The switch lamp was only a few feet from the crossing, and in attending to it he did not neglect his duties as flagman, nor was he prevented from discharging them. In fact, in caring for the switch lamps, he was practically at the crossing, and we are unable to find any substantial difference between this and the Coleman Case. It was as much the duty of Conniff to keep a lookout for trains approaching the crossing and give warning to travelers when he was arranging the switch targets as it was when he had finished this task, and was engaged in no other way than as flagman. Resting the case upon this ground, appellee did not owe Conniff any lookout duty, and was under no obligation to give him warning of the approach of its trains; in fact, owed no duty, until, as the court said in the instruction, he was discovered to be in peril.

A different rule obtains as to employees working upon the tracks or bridges of a railroad, or engaged in other employment, that do not impose upon them the duty of looking out for the approach of trains. Thus in *L. & N. R. R. Co. v. Lowe*, 118 Ky. 260, 80 S. W. 768, 65 L. R. A. 122, an assistant inspector of trains, who was struck while upon the tracks in the discharge of his duties by an engine that approached him in the rear without giving warning of its approach, was held entitled to recover damages; the court ruling that an instruction that if the jury believed from the evidence that he was on the track in the usual course of his employment, and that the agents in charge of the engine negligently failed to ring the bell, or give other signal of its approach, etc., was proper, quoting with approval *Thompson on Negligence*, and many other authorities. And so in *Cason v. Cov. R. R. Co.*, 93 S. W. 19, 29 Ky. Law Rep. 352, it was held to be the duty of persons in charge of trains to give warning of their approach to persons engaged in repairing the track.

But the rule announced in these cases cannot for the reasons stated be applied to the case before us, and the judgment of the lower court must be affirmed.



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(Supreme Court of Wisconsin, Jan. 29, 1907.)

[110 N. W. Rep. 427.]

**Negligence—Personal Injury—Conditions Precedent—Notice of Injury.\***—Under Rev. St. 1898, § 4222, providing that no action for a personal injury shall be maintained unless notice in writing signed by the party damaged shall be served on the person by whom it is claimed such damage was caused, etc., a notice of a personal injury need not state in terms that plaintiff claims that the damage was caused by defendant, and service of the notice sufficiently informs defendant of the claim that the damage was caused by it.

**Master and Servant—Injury to Servant—Notice of Injury—Sufficiency.\***—Under Rev. St. 1898, § 4222, declaring that the notice of a personal injury essential to the maintenance of an action therefor shall not be insufficient because of any inaccuracy or failure in stating the grounds on which the claim for damage is made, provided there was no intention on the part of the injured person to mislead the other party, and he was not misled, a notice of injury sustained by a section hand while assisting in the removal of a hand car from the tracks is not defective on the ground that it does not in terms declare that the hand car was precipitated onto the section hand by the negligence of defendant, where full disclosure was made to defendant's special agent shortly after the accident, so that defendant could not have been misled by the omission.

**Same—Negligence—Evidence—Question for Jury.**—In an action for injuries to a section hand while assisting in removing a hand car from the tracks, evidence examined, and held to support a finding that the act of the foreman of the section crew in lifting the car from the track was negligent because not in accordance with custom notwithstanding the conflict in the oral testimony on the issue of custom.

**Appeal—Verdict—Conclusiveness.**—A verdict rendered on conflicting, credible evidence and approved by the trial court will not be disturbed on appeal.

**Master and Servant—Injury to Servant—Negligence—Questions for Jury.**—In an action for injuries to a section hand while assisting in lifting a hand car from the track, evidence examined, and held, that the testimony of plaintiff that the act of the foreman in lifting the car from the track was not in accordance with the manner customarily adopted in similar situations was sufficient to support a finding that the foreman's act was negligent as against the objection that the testimony was contrary to the physical facts.

**Same.†**—A section crew was ordered by its foreman to lift a hand

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\*For the authorities in this series on the subject of notices of claims against railroads, see foot-notes appended to Atchison, etc., Ry. Co. v. Poole (Kan.), 21 R. R. R. 449, 44 Am. & Eng. R. Cas., N. S., 449.

†For the authorities in this series on the question whether a viola-

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car off the track on a high embankment. Two members of the crew, in accordance with custom, took hold of the front end of the car and lifted the wheels off the track and swung the car until it stood at right angles to the track, with the rear wheels resting against the inner edge of one of the rails. The foreman suddenly and not in accordance with custom lifted the rear end of the car from the rails, causing it to descend against the two men in front of it, and injuring them. Held to authorize a finding of negligence on the part of the foreman, rendering the railroad liable therefor.

**Same—Contributory Negligence.**—The members of the crew were not, as a matter of law, guilty of contributory negligence because they stood at the front end of the hand car, as they had no reason to anticipate that the whole weight thereof would be cast downward and against them by the unusual conduct of the foreman.

**Same—Assumption of Risk.**†—The members of the crew did not, as a matter of law, assume the risk of injury arising from the act of the foreman.

**Same—Proximate Cause.**§—A section crew was ordered by its foreman to take a hand car off the track on a high embankment. Two members of the crew, in accordance with custom, took hold of the front end of the car, lifted the wheels off the track, and swung the car until it stood at right angles to the track, with the rear wheels resting against the inner edge of one of the rails. The foreman suddenly lifted the rear end of the car and freed the wheels from the rails, causing it to descend against the two members standing in front of it, and injuring them. It appeared that, but for the slippery condition of the ground the two men could probably have held the car, notwithstanding the conduct of the foreman. Held, that the con-

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tion of a custom may be negligence, see extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296; extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236.

†For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to *Kennedy v. Kansas City, etc., R. Co. (Mo.)*, 21 R. R. R. 818, 44 Am. & Eng. R. Cas., N. S., 818; foot-notes appended to *Graham v. Chicago, etc., R. Co. (Tex.)*, 21 R. R. R. 549, 44 Am. & Eng. R. Cas., N. S., 549; *Farney v. Oregon Short Line R. Co. (Utah)*, 21 R. R. R. 529, 44 Am. & Eng. R. Cas., N. S., 529; foot-notes appended to *Anderson v. Northern Pac. Ry. Co. (Mont.)*, 21 R. R. R. 23, 24 Am. & Eng. R. Cas., N. S., 23; foot-notes appended to *Mumford v. Chicago, etc., Ry. Co. (Iowa)*, 20 R. R. R. 431, 43 Am. & Eng. R. Cas., N. S., 431; foot-notes appended to *Ives v. Wisconsin Cent. Ry. Co. (Wis.)*, 20 R. R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393; foot-notes appended to *Western Ry. v. Russell (Ala.)*, 20 R. R. R. 225, 43 Am. & Eng. R. Cas., N. S., 225; *Root v. Kansas City So. Ry. Co. (Mo.)*, 20 R. R. R. 171, 43 Am. & Eng. R. Cas., N. S., 171; foot-notes appended to *Drake v. San Antonio & A. P. Ry. Co. (Tex.)*, 20 R. R. R. 157, 43 Am. & Eng. R. Cas., N. S., 157; foot-notes appended to *Wagner v. Boston Elev. Ry. Co. (Mass.)*, 19 R. R. R. 187, 42 Am. & Eng. R. Cas., N. S., 187.

§For the authorities in this series on the question, what is, and is not, the proximate cause of an injury, see foot-notes appended to *Paquin v. Wisconsin Cent. Ry. Co. (Minn.)*, 21 R. R. R. 639, 44 Am. & Eng. R. Cas., N. S., 639; *Richards v. Sloss-Sheffield Steel & Iron*

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duct of the foreman was the proximate cause of the injury rather than the slippery condition of the ground, which was merely one of the surrounding circumstances.

**Same—Contributory Negligence—Burden of Proof.\*\***—An employer sued by an employee for injuries has the burden of proving contributory negligence.

**Trial—Instructions—Requests—Sufficiency.**—A party making an oral request for an instruction, without formulating the instruction desired, cannot predicate error on the court's refusal to grant the request.

**Same—Refusal of Instructions Covered by Those Given.**—Where the court instructed the jury as to each of the questions in the special verdict, where an affirmative answer would be favorable to plaintiff, that, to give such affirmative answer, they must be satisfied by a preponderance of the evidence, the refusal to charge that the burden of proof rested on plaintiff was not erroneous.

**Same—Deliberations of Jury—Coercing Agreement.**—The court, after the jury had deliberated for a time, recalled them, and asked if they could be aided either by further instructions or by the reading of any of the evidence. Before leaving the courthouse for supper, the judge directed the officer in charge to inquire whether the jury were likely to agree within 20 minutes, to which they responded in the negative. Held, that the acts of the court were not erroneous as coercing a verdict.

**Master and Servant—Railway Employees—Operation of Trains—Statutes—Construction.††**—The risk of injury attending the removal from the track of a hand car used for the transportation of a section crew and materials is peculiar to the "operation of railroads," within Rev. St. 1898, § 1816, as amended by Laws 1903, p. 741, c. 448, providing that every railroad shall be liable for damages to its employees, provided the same shall arise from a risk peculiar to the "operation of railroads."

Appeal from Circuit Court, Jefferson County; B. F. Dunwiddie, Judge.

Action by William Hardt against the Chicago, Milwaukee &

Co. (Ala.), 21 R. R. R. 36, 44 Am. & Eng. R. Cas., N. S., 36; foot-notes appended to *Hunter v. Atlantic Coast Line R. Co.* (S. Car.), 20 R. R. R. 55, 43 Am. & Eng. R. Cas., N. S., 55.

\*\*For the authorities in this series on the subject of the burden of proving contributory negligence, see foot-notes appended to *Adams v. Boston & N. St. Ry. Co.* (Mass.), 21 R. R. R. 70, 44 Am. & Eng. R. Cas., N. S., 70; foot-notes appended to *Mississippi Cent. R. Co. v. Hardy* (Miss.), 21 R. R. R. 1, 44 Am. & Eng. R. Cas., N. S., 1; *Indianapolis St. Ry. Co. v. Marschke* (Ind.), 20 R. R. R. 609, 43 Am. & Eng. R. Cas., N. S., 609.

††For the authorities in this series on the subject of the application of employers' liability acts, see foot-notes appended to *Southern Ry. Co. v. Simmons* (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572; foot-notes appended to *Hemphill v. Buck Creek Lumber Co.* (N. Car.), 20 R. R. R. 411, 43 Am. & Eng. R. Cas., N. S., 411.

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St. Paul Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for personal injuries. Plaintiff was a section hand of mature age and experience. On November 27, 1903, the section crew, consisting of foreman with plaintiff and one Davies, proceeded on hand car eastward to within about 80 feet of Rock River Bridge, and stopped on a high embankment and were commanded by the foreman to take off the car. Accordingly, and in accordance with custom, plaintiff and Davies took hold of the front end, lifted the wheels off the track and swung the car around to the southward until at right angles to the track, with the rear wheels resting against the inner edge of the south rail. There is dispute as to the width of the crown of the grade at this point, but where the men stood at the front end of the car it was considerably lower than the rail, and either just over or close to the edge where the steep slope of the bank commenced. The foreman, immediately they reached this point, and without warning, lifted the rear end of the car so that the wheels would clear the track, and so that, by reason of its position, it was thrust forward, and Davies and the plaintiff were unable to hold it, partly by reason of the slipperiness of the ground, and plaintiff was thrown down and severely injured by the car. The defendant claimed that this was the usual method of removing a hand car from a track with a crew of only three men. Plaintiff testified that the customary method in a high place like this differed in that, when the car had been brought to right angles with the track, the foreman customarily lifted one rear wheel, whereupon the car was swung further around until that wheel was over the track, and then the fourth wheel could be lifted over without peril of precipitating the car down the decline. The negligence was claimed to consist in the act of the foreman in thus suddenly lifting the rear of the car and allowing its whole weight to come upon the men at its front end. The jury found, by special verdict, (1) that the section foreman was not in the exercise of ordinary care at the time he lifted the car from the rail; (2) that such want of ordinary care was the proximate cause of the plaintiff's injury; (3) that the latter was guilty of no contributory negligence; and (4) damages. After motion to reverse the answers to the first, second, and third questions, and, failing that, that a new trial be granted, judgment was entered in favor of the plaintiff for the amount of damages found by the jury, from which the defendant appeals.

*Harlow Pease* and *H. H. Field* (*Charles E. Vroman*, of counsel), for appellant.

*Kading & Kading* (*R. B. Kirkland*, of counsel), for respondent.

DODGE, J. (after stating the facts). 1. The first assignment of error is predicated upon alleged insufficiency of the notice of injury served upon the defendant within one year after the event.

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That notice, addressed to the defendant, declared that plaintiff demanded satisfaction from the defendant for injuries received by him at the place described, in the performance of his duties as an employee, and that he was injured by a hand car rolling upon and over him down the embankment. The defect, and the only defect, urged by appellant's brief in this notice is that it fails to state, in terms, that the plaintiff claimed that the damage was caused by the defendant company. A complete answer to this criticism is that the statute does not require that the notice shall so state. The matters required to be stated by section 4222, Rev. St. 1898, in the notice are: The time and place, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made, and that satisfaction is claimed of the person or corporation notified. True, the statute does require that the notice shall be served "upon the person or corporation by whom it is claimed such damages were caused." But it was so served, and obviously, in the contemplation of the statute, the service of such notice sufficiently informs the defendant of the claim that the damages were caused by it. It was suggested upon oral argument that there was no specific statement of the grounds upon which the claim was made, in that the notice does not, in terms, declare that the hand car was precipitated onto the plaintiff by negligence of the defendant. This difficulty, however, is met by the further provision of the statute that the notice shall not be insufficient or invalid because of any inaccuracy or failure in stating the grounds on which the claim is made, provided it shall appear that there was no intention on the part of the person giving the notice to mislead the other party, and that such party was not in fact misled thereby. It was amply proved that full disclosure and explanation were made to the defendant's special agent within a very few days after the accident, so that defendant could not have been misled by any such omission in the written notice, nor could any intent to mislead have been presumed. *May v. Railway Co.*, 102 Wis. 673, 79 N. W. 31; *Collins v. City of Janesville*, 107 Wis. 436, 83 N. W. 695; *Garske v. Ridgeville*, 123 Wis. 503, 102 N. W. 22.

2. Great stress of argument is addressed by appellant to the proposition that the court should have directed a verdict for the defendant by reason of incredibility of plaintiff's testimony that the conduct of the foreman, in lifting both rear wheels at once clear of the rail so as to precipitate the whole weight of the car upon those standing in front, was unusual, and that there was a safer manner customarily adopted in situations like that here involved, and because it is conclusively established that the method adopted was the usual and customary one, to plaintiff's knowledge; that it was the only possible method and involved nothing of negligence on the part of the foreman; and hence that any risk therefrom was fully known to plaintiff and assumed by him, and he was guilty of contributory negligence in placing himself in a position where injury would be likely from that manner of doing the work. While perhaps it might be thought that there is a pre-

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ponderance of evidence in favor of the customariness of this method of removing the rear end of the hand car, resulting from the testimony of two witnesses generally to that effect, and an apparent declaration to the same effect by plaintiff in examination under section 4096, Rev. St. 1898, nevertheless the plaintiff, with much particularity and under a vigorous cross-examination in the presence of the jury, testified distinctly to another method which, obviously, would lessen the danger of such an injury as the plaintiff suffered. He also, being a German with very imperfect command of the English language, explained his understanding or misunderstanding of the questions put to him in the preliminary examination. His manner, intelligence, and fairness were before the jury, as they cannot be before us, and they seem to have believed him; and the trial court, in ruling upon the motion for a new trial, has declared his opinion against the incredibility of such testimony. The rule is thoroughly well established in this state that, under such circumstances of mere conflict of credible testimony of witnesses, this court should not and will not overrule the conclusions of the jury and the trial court. *Beyer v. Insurance Co.*, 112 Wis. 138, 88 N. W. 57; *Bannon v. Insurance Co.*, 115 Wis. 250, 256, 91 N. W. 666; *Meyer v. Insurance Co.*, 127 Wis. 293, 297, 106 N. W. 1087; *Peat v. Railway Co. (Wis.)* 107 N. W. 355. But it is declared that the method of removing the car described by the plaintiff is physically impossible. We confess to utter inability to discover any physical obstacle thereto. With the car at right angles to the track and the rear wheels resting against the inner side of the south rail and the forward part of the hand car tending downward toward a declivity, whether the men holding the front end were standing over the brow of that declivity or upon the gentler slope immediately adjoining the track we can see no impossibility in the lifting first of one corner of the rear end of the car, the swinging of the forward end so as to carry that wheel over the track and then the lifting of the remaining corner and shifting the rear end of the car sidewise the few inches necessary to carry the last wheel over the track. The adoption of such a method, instead of appearing to us incredible or even improbable, seems to us supported by the probabilities. A car resting upon its wheels and facing at right angles to the right of way is, of course, much more likely to escape from the control of the three men in charge of it and to run down the embankment than if it stand more nearly parallel to the track so that the wheels must scrape instead of turn to enable it to descend. After a most careful consideration of the contention of appellant's counsel we cannot agree that a position is presented rendering incredible the testimony of the plaintiff as to the manner in which hand cars were usually removed from tracks at the top of a fill or embankment like this. If that testimony was believed by the jury, there is no further difficulty in justifying their conclusion that a departure from custom by suddenly lifting the rear end and freeing the car from the obstacle to its descent offered by the rail was conduct which a reasonably prudent man



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might well anticipate would cause injury to those necessarily standing at the forward end of the car, and which might, therefore, be considered negligence. Nor, in such case, can we say, as matter of law, that one who stands in front of a hand car, as did the plaintiff, to control the front end of it, is guilty of negligence, when he has no reason to anticipate that its whole weight will be so cast downward and against him by such unusual conduct as that of which the foreman was guilty in this case. Nor, of course, can it be said, as matter of law, that he assumes the risk of that which does not usually take place, and which, therefore, he has no reason to expect.

3. A further contention closely connected with the last is that the lifting of the rear end of the car was shown by uncontradicted evidence not to have been the proximate cause of plaintiff's injury, but that the slippery condition of the ground resulting from a white frost was such. While the plaintiff states that, but for the slipperiness, he and his companion could probably have held the car notwithstanding the conduct of the foreman, yet that it was the sudden pressure against him resulting from such conduct which caused him to slip. There could hardly be a plainer case of an existing condition in face of which acts of carelessness were likely to be injurious so that those acts should be held to be the legal cause rather than the slippery condition of the ground, which constituted merely one of the surrounding circumstances and conditions. *Yess v. Brass Co.*, 124 Wis. 406, 102 N. W. 932; *Winchel v. Goodyear*, 126 Wis. 271, 277, 280, 105 N. W. 824; *Stefanowski v. Chain Belt Co. (Wis.)* 109 N. W. 532.

4. Several of the instructions given to the jury were excepted to, and they are assigned as error, but solely on the ground that they assumed that there was evidence upon which the jury might find the facts in accordance with plaintiff's testimony. Since we have already concluded that they might have done so, there was no error upon that ground in giving the instructions.

Error is assigned upon an instruction that the burden of proof was upon the defendant to establish contributory negligence. It is contended that this is incorrect for the reason that it might be established by plaintiff's own evidence. The subject was so lucidly explained, and appellant's position overruled, in *Schrunk v. St. Joseph*, 120 Wis. 223, 230, 97 N. W. 946, as to render any discussion here unnecessary. The rule given by the court was correct.

Error is also assigned because the court declined to give certain instructions at the request of the defendant. As, however, the request was a mere oral one, and did not even undertake to formulate the instruction desired, no error can be predicated merely upon its refusal. *Hacker v. Heiney*, 111 Wis. 313, 87 N. W. 249; *Taylor v. Seil*, 120 Wis. 33, 97 N. W. 498; *Cupps v. State*, 120 Wis. 504, 527, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996. Further, the matter of the request that the burden of proof rested on plaintiff was fairly covered by the instruction given. The court instructed the jury as to each of

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the questions where an affirmative answer would be favorable to the plaintiff that, in order to give such affirmative answer, they must be satisfied by a preponderance of the evidence, which certainly carried to the jury the idea that they could not decide against the defendant without being so satisfied. That is the burden of proof. *Bowe v. Gage*, 127 Wis. 245, 251, 106 N. W. 1074; *Anderson v. Chic. B. Co.*, 127 Wis. 273, 280, 106 N. W. 1077.

We find nothing of error nor reason to believe any prejudice to the defendant, in the fact that the court, after the jury had been deliberating for some time, recalled them and asked them if they could be aided in their deliberation either by further instructions or by the reading of any of the evidence, or that, before leaving the courthouse for supper, he directed the officer in charge to inquire whether the jury were likely to agree within the next 20 minutes, to which they responded in the negative. The court has full authority in the exercise of sound discretion to offer aid to the jury by way of further instruction or explanation, and he certainly can, without impropriety, make such an inquiry of them as was done in this case. In such acts there is by no means necessarily any implication of criticism as suggested by appellant's counsel, nor of urgency calculated to divert the jury from that deliberation which they may think necessary to the solution of the questions submitted to them. *Douglass v. State*, 4 Wis. 387, 393; *Odette v. State*, 90 Wis. 258, 62 N. W. 1054; *Secor v. State*, 118 Wis. 621, 95 N. W. 942.

5. Perhaps the most important question presented—raised by demurrer *ore tenus*—is whether the plaintiff's case falls within the exception to the common-law fellow-servant doctrine declared by section 1816, Rev. St. 1898, as amended by chapter 448, p. 741, Laws of 1903, "provided such injury shall arise from a risk or hazard peculiar to the operation of railroads." This phrase is apparently new in legislation. It is hardly accurate, since injuries do not arise from hazards or risks, but from acts or events. Perhaps the idea would be more clearly expressed by describing the injury or the event causing it as within such peculiar risks or hazards. However, we think the general meaning of the phrase reasonably clear. Before the passage of the act of 1903 there had been much debated both the constitutionality and the justice of placing employees of railroads upon different footing from other workmen not distinguishable from them either by the character of their employment or the perils of injury surrounding it. It was argued that it was neither just nor proper to distinguish one riveting a boiler in a shop belonging to a railroad company from one engaged in similar work in the shop of a manufacturer of threshing machines or steam dredges; or one felling timber for a railway company on its right of way from those performing like work on adjoining land for a private owner. The Supreme Court of Minnesota, in *Lavallee v. Railway Co.*, 40 Minn. 249, 41 N. W. 974, had declared the unconstitutionality of such discrimination. In that case, however, it was recognized

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that some employees of railroads are "exposed to peculiar hazards attending that business" of operating railroads legitimately distinguishing them from workmen in other employments. Some of those peculiarities were attempted to be described by the writer in his dissenting opinion in *Medberry v. Railway Co.*, 106 Wis. 191, 81 N. W. 659. Accordingly, the Minnesota court imported into their statute, by construction, a limitation to employees exposed to such peculiar hazards, and whose injuries resulted from acts or events within such risks. In Iowa we find a statute exempting injured employees from the fellow-servant doctrine when their injuries result from wrongs of co-employees "in any manner connected with the use and operation of the railway." It will be noticed that in both these statutes, after the judicial qualification in Minnesota, the expression "operation of the railroad" occurs as in our own, and, accordingly, their decisions are cited to us as persuasive as to the meaning of that phrase; it being contended that the removal of this hand car by the section men could not fall within "operation" of the railroad. In Iowa the weight of decision is against the view that mere repair of roadbed or track is operation. *Dunn v. Railway Co.* (Iowa) 107 N. W. 616. In Minnesota, apparently a contrary view prevails. *Nichols v. Railway Co.*, 60 Minn. 319, 62 N. W. 386; *Blomquist v. Railway Co.*, 65 Minn. 69, 67 N. W. 804. In apparent concurrence with which are *Callahan v. Railway Co.*, 170, Mo. 473, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746; *Stubbs v. Railway Co.*, 85 Mo. App. 192, and *Chicago, K. & W. Ry. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675. What we should conclude as between such conflicting views may well be left until some concrete case requires us to decide. The present one does not involve it, for, while the ultimate purpose of plaintiff and his fellows was to repair the roadbed, they were, at the moment of injury, engaged in the transportation of themselves, their hand car, tools, and materials from a station on the railway to the place of their proposed labor. The fact that they had reached the end of their trip and were in the act of alighting does not preclude the view that they were still in course of such transportation, which could not be considered terminated until destination was completely reached. The removal of the hand car tools and materials to their intended place beside the track was clearly part of their transportation. The protection accorded one "riding on an engine" extends to him while in the act of alighting. *Gaffney v. Railway Co.*, 127 Wis. 113, 120, 106 N. W. 810. We can entertain no doubt that the transportation of men and materials over its tracks is part of the operation of a railroad; and none the less so because the vehicle is a hand car. Such view seems to have the sanction of all decided cases speaking directly on the subject. *Frandsen v. Railway Co.*, 36 Iowa, 372; *Larson v. Railway Co.*, 91 Iowa, 81, 58 N. W. 1076; *Thompson v. Chappell*, 91 Mo. App. 297; *Chicago, etc., Railway Co. v. Artery*, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. Ed. 747; *Hervey v. Railway Co.* (Tex. Civ. App.) 89 S. W. 1095; *Houston, etc., Co. v. Jennings* (Tex. Civ. App.)

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81 S. W. 822. It also seems plain that the risk of injury attending the hurried removal of the hand car, at such an inconvenient and dangerous place as the crest of a steep decline, was peculiar to the railroad business. The likelihood of passing trains rendered such act imperative whatever the difficulties or dangers, as it would not ordinarily be in any other employment or business. We conclude the trial court was right in refusing to rule that plaintiff was outside the protection afforded employees of railroads by section 1816, Rev. St. 1898, as amended.

Judgment affirmed.

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. BOSTON & M. R. Co. v. GOKEY.

(Circuit Court of Appeals, Second Circuit, December 4, 1906.)

[149 Fed. Rep. 42.]

**Master and Servant—Injuries to Servant—Railroads—Defective Appliances—Assumed Risk.\***—Plaintiff, a brakeman, while in defendant's employ, was struck by a switch target and thrown to the ground from a moving freight car while he was climbing up the ladder to release a brake, with his back to the switch. The switch had been changed shortly before, and plaintiff testified that he had no knowledge of its dangerous proximity to the track and had never been warned concerning the same. Held, that the danger from such structure was not one of the ordinary risks which plaintiff assumed.

**Same — Contributory Negligence — Question for Jury.**—Whether plaintiff was guilty of contributory negligence was for the jury.

**Courts — Federal Courts — Jurisdiction — Court of Appeals.**—Act Cong. March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], provides that writs of error may be taken direct to the Supreme Court in any case in which the jurisdiction of the circuit court is in issue, and section 6 (26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) declares that the Circuit Courts of Appeal shall have jurisdiction in all cases except those provided for in section 5. Held, that the Circuit Court of Appeals has no jurisdiction to pass on questions challenging the jurisdiction of Circuit Courts.

Wallace, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the District of Vermont.

See 130 Fed. 992, 994.

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\*For the authorities in this series on the question whether railroad employees assume the risks from structures over or near tracks, see foot-notes appended to *Wilson v. Lake Shore, etc., Ry. Co.* (Mich.), 21 R. R. R. 356, 44 Am. & Eng. R. Cas., N. S., 356; *Denver & G. R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361.

For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see preceding case and foot-notes.

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Writ of error to the Circuit Court of the United States for the District of Vermont to review a judgment entered on the verdict of a jury in favor of the plaintiff for \$3,350.

*G. B. Young*, for plaintiff in error.

*H. W. Cook* and *E. A. Hovey*, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The plaintiff, a brakeman in the employ of the defendant, was, while in the discharge of his duties, struck by the target of a switch and thrown to the ground from a moving freight car. He received injuries which resulted in the amputation of one of his feet three inches above the ankle. The switch which caused the accident was located in the freight yard at Lyndonville, Vt., having been placed in position but a few weeks prior to the accident. The dangerous proximity of the target to the track was unknown to the plaintiff as he testified that he had never operated it in its changed location or been warned regarding it. It was so near the track that while in the act of climbing up the ladder of the moving car to release a brake, with his back to the switch, he was caught by the target and hurled to the ground. In other words, there was not room enough to permit the body of a brakeman in that position to pass in safety.

It cannot be successfully maintained that the danger from such a structure was one of the ordinary risks assumed by the plaintiff on entering the defendant's employ. The law imposed upon the defendant the duty of furnishing for the use of its servants fit and suitable means and appliances. The jury found that the defendant failed to perform this duty; they found, in effect, that the defendant furnished an unsafe switch with the target so located that it served as a trap in which employees, ignorant of its position, might be caught and killed or injured. Whether such a structure was one reasonably safe and proper to be maintained at the place described was a question of fact and was presented to the jury under instructions as favorable as the proofs warranted.

The same statement is true as to the alleged contributory negligence of the plaintiff. It cannot be said, as matter of law, that he was at fault in not ascertaining the situation in time to avoid contact with the target. The peril was not so obvious as to justify the trial court in imputing negligence to the plaintiff in failing to discover it. In the absence of notice or knowledge to the contrary he had a right to assume that, when in the discharge of his duty he was required to mount a moving car, he would not be hurled to the ground by a target placed so near the car that his body could not pass in safety. At least it was a question for the jury.

The case is an exceedingly simple one upon the facts, involving questions which are constantly arising in negligence cases; these question were properly sent to the jury under instructions which

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fairly presented the conflicting contentions of the parties and, after a careful examination of the record, we fail to find any error which warrants us in reversing the judgment. We are unanimously of the opinion that the trial was fairly and impartially conducted and that the verdict, considering the irreparable injury to the plaintiff, was a moderate one.

We refrain from discussing the jurisdictional question argued at the bar and in the briefs, for the reason that this court since its organization has uniformly held that the act creating the Circuit Courts of Appeal confers no authority upon these courts to pass upon questions challenging the jurisdiction of the Circuit Courts. Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547]. Section 5 of the act (26 Stat. 827 [U. S. Comp. St. 1901, p. 549]) provides that writs of error may be taken direct to the Supreme Court in any case in which the jurisdiction of the Circuit Court is in issue, and section 6 (26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) provides that the Circuit Courts of Appeal shall have jurisdiction in all cases except those provided for in section 5. This court has no appellate jurisdiction except such as is conferred by statute and we have been unable to perceive how the statute can be logically construed to bestow upon us a right which is expressly conferred on the Supreme Court and is expressly withheld from us. *U. S. v. Lee Yen Tai*, 113 Fed. 465, 51 C. C. A. 299; *Fisheries Co. v. Lennen*, 130 Fed. 533, 65 C. C. A. 79; *Penn. Lumberman's Ins. Co. v. Meyer*, 126 Fed. 354, 61 C. C. A. 254; in s. c. 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; *Sun Printing Ass'n v. Edwards*, 194 U. S. 377, 24 Sup. Ct. 696, 48 L. Ed. 1027; *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; *Halpin v. Amerman*, 138 Fed. 548, 70 C. C. A. 462.

The judgment is affirmed, with costs.

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**WILLIAMS v. CHOCTAW, O. & G. R. Co. et al.**

(Circuit Court of Appeals, Sixth Circuit, December 5, 1906.)

[149 Fed. Rep. 104.]

**Trial—Motion for Direction of Verdict.**—On a motion to direct a verdict, the court must take that view of the evidence most favorable to the party against whom the direction is requested, who is entitled to the benefit of all fair and reasonable inferences from the testimony.

**Master and Servant—Injury to Servant—Duty to Observe Defects in Appliances.\***—A railroad employee, working constantly with an engine in the yards, may not close his eyes to obvious and dangerous conditions or defects therein, and recover for an injury resulting

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\*See preceding case, and foot-notes.



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therefrom; but, if an accident occurs, and he pleads ignorance, he must show that his ignorance was not only actual, but excusable.

**Same—Action for Injury—Contributory Negligence.**—Plaintiff was foreman of a switching crew, working with an engine in railroad yards, and had used the same engine for a month, when he slipped from the footboard at the rear of the tender, at night, and was injured. It appeared that the footboard was defective, in that it sloped downward, and was also icy that night by reason of the leaking of the tank. Such defects had existed for some time, and plaintiff had worked with the engine every day, and had ridden on the footboard. The engine was backing, making the position one of danger, and plaintiff was not compelled to occupy it at the time, but took it for greater convenience. Held, that he was chargeable with knowledge of the defects which he ought to have possessed in the exercise of ordinary care and observation, and was guilty of contributory negligence which precluded him from recovering for the injury.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

*E. G. Bell*, for plaintiff in error.

*E. E. Wright*, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit brought by Williams, the plaintiff below, against the defendant railroad companies, to recover damages for injuries received in the yards at Memphis, Tenn., while employed as foreman of a switch engine and crew. At the time of the accident Williams was on the rear end of the tender. The train was backing, so he was in front of it. Attached to the rear of the tender was a footboard. The night was cold and freezing. He desired to get off the train to deliver some bills and to see that a switch was all right. As he went to get off, his foot slipped on the footboard and he fell under the train, losing one leg and having the other badly mangled. He claimed in his petition that the footboard and the tank above it were defective; the footboard because the L-shaped irons which supported it at the rear of the tank, were bent inward, giving it a dangerous slope, and the tank because it leaked, allowing the water to trickle down on to the footboard, where it froze, creating an icy, slippery surface. Williams claimed he was not aware of the condition of the footboard, and, relying upon the companies having used ordinary care in providing a reasonably safe place and appliances for his use, stepped upon it, when the accident resulted without his fault. The court below directed a verdict for the defendants on the grounds either that Williams knew or ought to have known of the condition of the footboard, and assumed the risk of using it, or was guilty of contributory negligence in using it under the circumstances, or both.

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The rule is well settled that, where a motion is made to direct a verdict, the court must take that view of the evidence most favorable to the party against whom the direction is requested. In this case, Williams was entitled to receive the benefit of all fair and reasonable inferences from the testimony. *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463; *Mason v. Yockey*, 43 C. C. A. 228, 103 Fed. 265; *Riley v. L. & N. R. R. Co.*, 66 C. C. A. 598, 133 Fed. 904. It appears from the record that Williams was an experienced railroad man. He had been employed in the business for some 18 years, first as brakeman, and latterly as foreman of the switch engine and crew. As foreman he had charge of the switch engine and crew. The tender, with its appurtenances, was deemed a part of the switch engine. It was the duty of the engineer to inspect the engine each day when he took it out, reporting any defects, and it was also the duty of Williams to report any defects he might observe, either in the engine or the cars; but he was not obliged to inspect either. This engine had been in use in and about Memphis for about a month, and Williams had charge of it and the crew during that time. The accident occurred on the 27th of December. For two or three days before that date it had been raining, and on that date it turned cold, and in the afternoon began to freeze. The engineer, who had been in charge of the engine from the time it reached Memphis, testified that he had observed the slope in the footboard and the leak in the tender from the first, but did not report them, because he did not think they were very dangerous. One of the brakemen, whose station was at the rear of the tender, testified that he had observed the slope and leak, and that an experienced man could tell, from stepping on the footboard, that it was sloping. Williams stated he had not been on the footboard the day of the accident prior to its occurrence, or for several days before, because it was raining and he rode in the cab. He admitted having been near the footboard on numerous occasions, and did not deny having been on it prior to the day of the accident, but testified he was not aware of the existence of the slope or the leak. He conceded it would have been his duty to report these defects if he had observed them, but contended it was the duty of the engineer both to inspect and report, and, since the engineer did not report them, he insisted he had a right to rely upon the footboard being in a reasonably safe condition.

Conceding that the primary duty of inspection rested upon the engineer as the representative of the railroad companies, and that he should have reported these defects, so that the companies might have discharged their duty to use ordinary care to keep the footboard reasonably safe for the use of their employees, including Williams, nevertheless it was the duty of Williams, as a servant engaged in a hazardous occupation, to employ his facilities, as reasonably prudent men do, to ascertain the condition of the machinery and appliances provided for his use. In the case of latent defects he may rely upon the in-

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spection of the companies; but in the case of open and patent defects he must take steps to protect himself or be held to have assumed the risk. He may not close his eyes to obvious and dangerous conditions and expect to recover in case of accident. If accident comes, and he pleads ignorance, he must show his ignorance was not only actual but excusable. *Cunningham v. C., M. & St. P. Ry. (C. C.)* 17 Fed. 882; *Detroit Crude Oil Co. v. Grable*, 36 C. C. A 94, 94 Fed. 73; *Deed v. Stockmeyer*, 20 C. C. A. 381, 74 Fed. 186; *McCain v. C., B. & Q. R. R. Co.*, 22 C. C. A. 99, 76 Fed. 125; *Tuttle v. Milwaukee Ry. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *Washington & Georgetown R. R. Co. v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Southern Pac. R. R. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391.

In the present case, the question is, not whether Williams actually knew of the slope and leak, but whether, in the proper and prudent use of his opportunities for observation, he could and should have known of them. Giving Williams the benefit of all he claims from the testimony, still the question recurs whether, if he had used his eyes when near the footboard and tank, and his sense of feeling when on the footboard, would he not have known, would not any ordinary prudent man, under the circumstances, have known, that the footboard sloped and the tank leaked? We are unable, after careful consideration, to satisfy ourselves that this question can rightly be answered other than in the affirmative. Conceding the slope and leak were defects which caused the accident, and that Williams did not know of their existence, we are forced to the conclusion that any person of ordinary prudence, exercising reasonable care in the employment of the opportunities for knowledge open to Williams, would have discovered them under the circumstances of this case. The knowledge that he thus ought to have acquired by the proper and prudent use of his faculties the law imputes to him, and he must be taken to have assumed the risk resulting from the use of these defective appliances. Williams had charge of this switch engine about a month. He was near this footboard and tank every day during that time. He was certainly on the footboard before the day of the accident. In the case of *Mason v. Yockey*, 43 C. C. A. 228, 103 Fed. 265, where a fireman, stepping on the iron apron between the engine and tender, which had become icy from water escaping from the tender through a defective valve, had slipped and fallen from the engine, receiving serious injuries, the action of the court below in permitting the case to go to the jury was sustained on the ground that the fireman had not been at work on the engine before during that winter, that he got on it at break of day on a cold winter morning, and was kept constantly employed up to the time of the accident in the discharge of his duties as fireman, being required to fire every two or three minutes. It will be observed that, when the defect became discoverable, the engine was out on the road, and the question pre-

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sented to the fireman of assuming the risk of such a defect, when the alternative was to abandon the engine and train, was quite different from that presented where the engine is in the yard of the railroad company. Still we consider this a very close decision. Of a similar character is that in the case of *Le Duc v. N. P. R. R. Co.*, 92 Minn. 287, 100 N. W. 108, in which the plaintiff's intestate, a switchman, fell from a defective footboard at the rear of the tender of a switch engine, and was run over and killed. It appeared that his duty required him to use the footboard and that he had never been on it before.

Taking another view: The footboard on the rear of a tender, used when the engine is backing, occupies the same relative position that the pilot of an engine does to the train when it is moving forward. It is a place of danger, not to be used unnecessarily. *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506; *Kresanowski v. N. P. R. R. Co. (C. C.)* 18 Fed. 229; *Kane v. Erie R. R. Co. (C. C. A.)* 142 Fed. 682. An experienced employee, called upon to use it, would naturally, in the exercise of ordinary care, take steps to ascertain its condition, and the nature of the foothold it would afford in alighting from the train, before intrusting himself to it. This would be especially true after dark, on a rough track, in freezing weather, with the chance of ice on the footboard. In the present case, the testimony shows it was not necessary for Williams to use this footboard in front of the moving train in order to get off. He had been riding in the cab. He might have done so that night. No reason for the change was given. If, as he claims, he did not know the condition of the footboard, then he unnecessarily chose a place certainly of danger, and possibly of unusual danger, when one of safety was open to him. In doing this we think he acted negligently.

The judgment is affirmed.

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**URBANNECK v. PENNSYLVANIA R. Co.**

(Supreme Court of New Jersey, March 12, 1907.)

[65 Atl. Rep. 897.]

**Master and Servant—Negligence of Servant—Injury to Third Person.**—The shipper of a turntable agreed to load the same upon defendant's car. While the plaintiff, a servant of the shipper, was securing the turntable in position upon the car, a servant of the defendant negligently permitted a hook, which attached a derrick to the turntable and held the latter temporarily in position, to become unhooked, by reason of which the plaintiff was injured.

Held, that the railroad company was liable.

(Syllabus by the Court.)

Appeal from Hoboken District Court.

**Urbanneck v. Pennsylvania R. Co**

Action by Otto H. Urbanneck against the Pennsylvania Railroad Company. From a judgment for plaintiff before a justice, defendant appeals. Affirmed.

Argued November term, 1906, before FORT, PITNEY, and REED, JJ.

*Weller & Lichtenstein*, for plaintiff.

*Vredenburg, Wall & Van Winkle*, for defendant.

REED, J. This is an appeal from the Hoboken district court. The case was tried before the court without a jury, and judgment was rendered for the plaintiff.

From the rather confused testimony, the following facts seem to be exhibited: The plaintiff was employed by Focht & Co. as a sheet-iron worker and boiler maker. On May 5, 1906, the plaintiff, with two other servants of Focht & Co., accompanied a turntable made by Focht & Co. to the yard of the Pennsylvania Railroad at Jersey City for the purpose of shipping the turntable by that railroad to Red Bank. When they arrived a standing derrick was attached to the turntable by two iron clamps brought by the plaintiff and his assistants and screwed into the turntable. There was no car immediately at hand, and the turntable was hoisted by the derrick and left swinging in the air until a car was drilled under the suspended table. The table was round, and was 12 feet in diameter. The car was 8 feet in width, with sides 3 to 6 feet high. The turntable was lowered onto the car, and one side of the turntable, as one witness states, was lying on the side of the car. By other witnesses it appears to have been supported by the derrick. In either case it appears that the turntable was held in position by the derrick, and the plaintiff and his assistants took a brace, which the plaintiff had made, and which he had brought with him, and attempted to put it under the table for the purpose of supporting it in a position in which it could safely ride. The plaintiff then endeavored to fasten the turntable to the brace. Two holes had been bored for that purpose, but they could not be made available, so it was proposed by driving nails to keep the table in place until they could bore new holes. While they were working at this, the hook, which held the table partly suspended in position, was permitted to become detached by a servant of the railroad company, and the turntable fell and struck the plaintiff in the chest, inflicting an injury.

There is evidence, as already remarked, that Focht & Co. were to do the loading. There is evidence that defendant's servants were operating the derrick. There is evidence that one of those servants unloosed the hook, by which the support of the table was removed, and we think that in the circumstances there was no legal error in the finding of the trial judge that this was negligence imputable to the defendant.

The judgment is affirmed.

PHILBY *v.* NORTHERN PAC. RY. CO. *et al.*

(Supreme Court of Washington, April 4, 1907.)

[89 Pac. Rep. 468.]

**Death—Right of Action by Husband—Damages.\***—A husband can recover for loss of time and funeral expenses resulting directly from the wrongful death of his wife.

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by C. W. Philby against the Northern Pacific Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

*B. S. Grosscup, A. G. Avery, and G. C. Israel*, for appellants.  
*Troy & Falknor*, for respondent.

CROW, J. Action by C. W. Philby against the Northern Pacific Railway Company and the Black Hills & Northwestern Railway Company, corporations, to recover damages for loss of time and funeral expenses, rendered necessary by the negligent and wrongful acts of the defendants in causing the death of Lula Bland Philby, the plaintiff's wife. From a judgment in favor of the plaintiff the defendants have appealed.

The sole question on this appeal is whether the respondent, a husband, can recover for loss of time and funeral expenses directly resulting from negligent acts of the appellants, which caused the death of his wife. The trial court, following *Johnson v. Seattle Electric Company*, 39 Wash. 211, 81 Pac. 705, held that the respondent was entitled to recover. The appellants contend that such holding was erroneous. They insist that in the *Johnson Case* this court followed *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822, by definitely holding that, under section 4828, Ballinger's Ann. Codes & St., a husband cannot maintain an action for damages resulting from the wrongful death of his wife; that the language in the *Johnson Case* upon which the trial court based its decision was undoubtedly used by this court without consideration, and can be attributed to the fact that liability for funeral expenses was conceded by the respondent in its brief; that it would be an anomaly for us to hold a husband had no cause of action for the death of his wife, and at the same time permit him to recover damages growing out of her death; that the statute gives him

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\*For the authorities in this series on the subject of the elements of damages recoverable by husband or wife for death or injuries to the other, see foot-notes appended to *Standen v. Pennsylvania R. Co.* (Pa.), 20 R. R. R. 601, 43 Am. & Eng. R. Cas., N. S., 601; foot-notes appended to *Hutchei's v. Cedar Rapids, etc., Ry. Co.* (Iowa), 19 R. R. R. 362, 42 Am. & Eng. R. Cas., N. S., 362.



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no such right of action; that he could not sue at common law—citing *Baker v. Bolton*, 1 Campb. 439—that the only departure from the common-law rule has been made by Lord Campbell's act, and similar statutes in this country; that such acts have only extended a right of action to certain specified beneficiaries, and that under section 4828, Ballinger's Ann. Codes & St., the statute of this state, as repeatedly construed by this court, the husband of a deceased wife is not such a beneficiary. In brief, the appellants contend (1) that the respondent has no right of action at common law; (2) that no right of action has been conferred upon him by any statute, naming him as a beneficiary; and (3) that, having neither a common-law nor a statutory right of action, he cannot recover. Statutes permitting a husband or any other beneficiary to recover damages for the wrongful death of a wife or relative are based upon the idea of giving compensation for loss of services, companionship, etc. In other words, they were intended to award compensation for a human life, giving damages of character which, although real, were theretofore not the subject of judicial computation, and could not be allowed or estimated by any exact rule of mathematical calculation. In such statutory actions the exact damages to beneficiaries cannot be accurately proven, but juries, after being advised of all the material facts and circumstances, such as the health, habits, age, expectancy of life, capacity to earn money, habits of economy, etc., of the decedent, are called upon to award such damages as in the exercise of their judgment they conclude will be a just compensation. Such damages in their very nature differ materially from the pecuniary loss for funeral expenses and loss of time sustained by a husband, whose wife is killed by the wrongful or negligent act of another. The wife's death imposes upon the husband the financial burden of funeral expenses which he must pay. At common law, he was bound to bury his deceased wife in a suitable manner, and defray the necessary expenses thereof if he possessed the means. 13 Cyc. 273. Such expenses can be exactly estimated; and, while in one sense they may have ensued from the death of the wife, they are more, strictly speaking, a financial loss, resulting directly from the negligent acts of another.

Although the appellants have cited an English Case (*Baker v. Bolton*, *supra*), to show that "in a civil court the death of a human being could not be complained of as an injury," they have failed to cite, and we are unable to find, any authorities going so far as to hold that, in the absence of express statutory provision therefor, a claim for funeral expenses such as the one presented in this action cannot be recovered. In *Dalton v. S. E. Ry. Co.*, 4 C. B. (N. S.) 296, the plaintiffs, husband and wife, were permitted to recover for the wrongful death of their son, who, although above the age of majority, had contributed to their support; the action being founded on Lord Campbell's act. The jury, with other items of damages, allowed £10 for funeral expenses and £15 for mourning. These

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and other items were resisted by the defendant, and the court in rendering judgment said: "As to the expenses of the funeral and mourning, however, we think they ought not to be allowed. The subject-matter of the statute is compensation for injury by reason of the relative not being alive; and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral, or in putting on mourning for his loss." According to this theory Lord Campbell's act would not permit any recovery for funeral expenses. Some of the American courts, however, have permitted such a recovery. See 13 Cyc. 374, and cases cited in note 29. In *Murphy v. New York Central, etc., R. R. Co.*, 88 N. Y. 445, such an act was construed, and the court not only held that funeral expenses could be recovered, but also recognized them to be an item of pecuniary damages, which only one of the plaintiffs was obliged to pay, and which were different from the ordinary damages allowed by reason of the statute. See, also, *Houghkirk v. President, etc.*, 92 N. Y. 219, 44 Am. Rep. 370; *Roeder v. Ormsby*, 22 How. Prac. (N. Y.) 270. The appellants, in support of their contention that the respondent cannot recover, vigorously urge the construction placed upon the word "heirs" in section 4828, Ballinger's Ann. Codes & St., in the following cases: *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; *Nesbitt v. Northern Pacific Ry. Co.*, 22 Wash. 698, 61 Pac. 141; *Robinson v. Baltimore & S. M. & R. Co.*, 26 Wash. 484, 67 Pac. 274; *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333; *Manning v. T. R. & P. Co.*, 34 Wash. 406, 75 Pac. 994; *Johnson v. Seattle Electric Co.*, 39 Wash. 211, 81 Pac. 705. In *Manning v. Tacoma Ry. & P. Co.*, *supra*, although adhering to the rule previously announced in *Noble v. Seattle*, *supra*, we said: "We think it proper to say that, as this court is now constituted, if the question were now here as one of original statutory construction, it is not improbable that a different construction would be adopted." While still adhering to the construction heretofore placed on this statute, we do not feel inclined to extend the same, and therefore decline at this time to announce the rule that the respondent cannot recover in this action for his loss of time and his disbursement for funeral expenses, which as damages resulted directly from the wrongful acts of the appellants.

In the early English case of *Higgins v. Butcher*, Yelverton Reports, 89, the plaintiff declared that "the defendant assaulted and beat, etc., A., his wife, such a day, from which she died such a day following, to his damage," etc. Tanfield, Justice, speaking for the court, said: "If a man beats the servant of F. S., so that he dies of that battery, the master shall not have an action against the other for the battery and loss of service, because the servant dying of the extremity of the battery, it is now become an offense to the crown, being converted into felony, and that drowns the particular offense, and private wrong offered to the master before, and his action is thereby lost." This opinion was rendered in 1607, and no kindred English case seems to have been reported

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until 1806, when Lord Ellenborough held, in *Baker v. Bolton*, 1 Campb. 493, cited by appellants, that in a civil court the death of a human being could not be complained of as an injury. In *Worley v. C., H. & D. R. R. Co.*, 1 Handy (Ohio) 481, a husband sued to recover damages resulting from the wrongful death of his wife, asking \$5,000 for the loss of her services, and also stating that he had expended a considerable sum for funeral charges. The question involved was his right to recover these damages independent of statute. Mr. Justice Storer, in a very able opinion, reviews the authorities, and, discussing *Higgins v. Butcher*, *supra*, said: "The reasoning in *Yelverton* we could not adopt, as it is inapplicable to our judicial proceedings. We have no felonies, as at common law or by the British statutes; the commission of crime here works no corruption of blood, or attainder of estate; the individual doing the wrong, though punishable to the extremity of the law, is still liable for the personal injury he inflicts, and his estate may be legally subjected, by way of indemnity, to the injured party."

Referring to the later case of *Baker v. Bolton*, *supra*, the learned justice further said: "The ground of Lord Ellenborough's opinion is more in consonance with our jurisprudence, and gives a broader rule for the decision of the question. It was confined, however, to a single point, and did not present, so fully as might have been expected from so profound a jurist, the whole argument; but we may well suppose that, where no precedent could be found for the action, a simple negation of the right to recover was all that he deemed it necessary judicially to affirm. When it is said that the death of a human being cannot be made the subject of damages in a civil action, we must infer that to allow the remedy in such a case would be inconsistent with the policy of the law that will not permit the value of human life to become the subject of judicial computation." The value of Mrs. Philby's life has not become the subject of judicial computation in this action. The respondent only seeks to recover money actually disbursed by him for funeral expenses and the value of his lost time. In the *Worley Case* two items of damages were pleaded: (1) the husband's loss of the services of his wife in the care of his children and the management of his household affairs; and (2) the sum expended for funeral charges. Mr. Justice Storer, after discussing the English cases above mentioned, and also several early American cases, calls attention to the fact that the action was not brought under the Ohio statute, and speaking of that statute said: "The second section distributes the damages recovered between the widow and the next of kin, which presupposes that the wife is deprived of her husband, and very strongly indicates that it was not the intention of the Legislature to extend the remedy to him should he survive the wife; and such is the construction, we believe, that is given to the statute of New York on the same subject." The learned jurist closes his opinion by saying: "We can find no authority, and we are satisfied there is no sound reason, on general principles, to authorize a recovery by the plaintiff. On the whole case, we hold, there is no claim in the petition that can be legally

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supported, except for the expenditures actually made in consequence of the wife's death; and for these, as the husband would have been liable, he has the right to recover; as to all the remaining claim for damages, the demurrer must be sustained." We adopt the conclusion reached in this exhaustive opinion, based upon the theory that a clear distinction exists between damages resulting to a husband from the death of his wife in the loss of her services and companionship, and pecuniary damages resulting to him, such as funeral expenses and loss of time. We hold that, while under our statutes and the previous decisions of this court, he cannot recover the former, he is nevertheless entitled to recover the latter, regardless of any statute. This doctrine is in harmony with the rule announced in *Johnson v. Seattle Electric Company*, upon which the respondent relies, and which the appellants have sought to distinguish. It also harmonizes with *Dean v. O. R. & N. R. R. Co.*, 87 Pac. 824, where we said: "It is urged that respondent was not entitled to recover expenses for transporting the body of decedent to respondent's home in Arkansas. The total amount for this and burial expenses was \$178. We think this a moderate sum to ask. It was the duty of respondent to bury the body of his minor son, and it was but natural and fitting that the remains should be taken back to the old home. Appellant being responsible for decedent's death, it is holden to pay the reasonable cost of burial and the expenses appropriately incidental thereto. In view of these considerations and the small sum expended and sought to be recovered, we think the allowance justifiable."

The learned trial judge committed no error in permitting the jury to award the damages in question.

The judgment is affirmed.

HADLEY, C. J., and FULLERTON, MOUNT, and ROOT, JJ., concur.

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**HYDE v. BOSTON & W. St. Ry. Co. et al.**

(Supreme Judicial Court of Massachusetts, Worcester, Feb. 26, 1907.)

[80 N. E. Rep. 517.]

**Street Railroads—Remedy of Owners of Property Injured.**—A street railway company, changing the grade of a highway for the construction of its road in accordance with locations granted by the officers of a municipality, is not liable for damages to an abutting owner.

**Same—Statutes—Construction.**—Rev. Laws, c. 48, § 7, and chapter 51, §§ 15, 16, authorizing a person aggrieved by the relocation or alteration of a highway to petition for the assessment of his damages by a jury, etc., afford no relief to an abutting owner for injuries caused by a change of the grade of a highway made by street railway company for the construction of its road in accordance with locations granted by municipal officers.

**Same.**—A street railroad, authorized by St. 1901, p. 388, c. 455, to

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construct its railway largely outside the limits of highways, which was empowered by the selectmen of a town to cross a highway below grade, without providing that abutting owners should be compensated for injuries sustained, is not liable to an abutting owner, either under St. 1906, p. 604, c. 463, pt. 3, § 47, relating to the liability of a street railway company crossing a public way, or under Rev. Laws, c. 112, § 44, authorizing street railway companies, without payment of any fee, to open any road in which any part of its railway is located, etc.; the condition imposed on the company carrying the highway over its tracks on a bridge being reasonable and promoting the security of travelers on the highway.

**Eminent Domain—Taking Property—Streets—New Use—Statutes—Validity.**—The statute authorizing the selectmen of a town to permit a street railroad company, in the construction of its track, to change the grade of a street without making compensation to abutting owners injured thereby, is not unconstitutional, since such abutting owners, on the condemnation of their land for a public highway, received compensation for such injury, within Const. pt. 1, art. 10, providing that, when property is appropriated to public uses, the owner shall receive compensation therefor.

Report from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Angeline E. Hyde against the Boston & Worcester Street Railway Company and others. The superior court ruled in favor of defendants, and certified the case to the Supreme Judicial Court. Judgment ordered in accordance with the rulings of the superior court.

*Frederick H. Nash, Frank W. Knowlton, and Choate, Hall & Stewart, for plaintiff.*

*Guy Murchie, for defendants.*

RUGG, J. This case must be decided in the light of several recent decisions respecting the liability of street railway companies and municipalities for the construction of street railways in accordance with locations duly granted. *Purlington v. Somerset*, 174 Mass. 556, 55 N. E. 461, was an action of tort for damages sustained by the plaintiff by reason of the lowering of a public highway upon which his land abutted by a street railway company acting under the authority of a location granted by the selectmen. The defendant was held not liable. *Vigeant v. Marlborough*, 175 Mass. 459, 56 N. E. 708, and *Underwood v. Worcester*, 177 Mass. 173, 58 N. E. 589, were petitions under Pub. St. 1882, c. 52, §§ 15, 16 (Rev. Laws, c. 51, §§ 15, 16), for the assessment of damages occasioned, in the first case by the raising and in the second by lowering, of a street in front of the petitioner's premises by a street railway company acting in accordance with restrictions contained in locations. In both cases the petitioner was precluded from recovery on the general ground that the grant of location was made by public officers, who were not acting as agents of



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the municipality, and that the restrictions were reasonable. *Hewett v. Canton*, 182 Mass. 220, 65 N. E. 42, was an action of tort for damages caused by the overflow of water, growing out of obstructions in a gutter occasioned by the construction of a street railway under a legally granted location. In *Laroe v. Northampton St. Ry. Co.*, 189 Mass. 254, 75 N. E. 255, the plaintiff sought by an action of tort to recover damages for the building of an embankment upon the highway in front of the premises, and the turning of surface water upon his property by a street railway acting under a lawful location. In the two latter cases judgment was for the defendant, for the reason that the primary and direct purpose of these changes in the grade of the highway was the construction of the street railway. If the highway was improved or harmed for the purposes of the public travel by such changes, this result is subsidiary and incidental. It came about through the action of public authorities over whom in respect of their public duties the municipality in its corporate capacity can exercise no control. *Flood v. Leahy*, 183 Mass. 232, 66 N. E. 787.

Since 1823 it has been the law of this commonwealth that no action of tort can be maintained for the changing of the grade, or raising or lowering the surface, of a highway by one authorized by law to do so. *Callender v. Marsh*, 1 Pick. 418. This case has been many times cited with approval and the principle it illustrates has been often applied. Inasmuch as the changes of grade in highways occasioned by the lawful construction of street railways are not made by those charged with the duty of keeping highways in repair, the statutes passed with the apparent intention of remedying the injustice wrought by the highway statutes as revealed in the decision of *Callender v. Marsh*, *supra* (Rev. St. c. 25, § 6; St. 1842, p. 538, c. 86, § 2; Rev. Laws, c. 48, § 27, c. 51 §§ 15, 16) afford no relief. At the time these statutes were enacted, the modern public service corporation entering upon highways and altering their aspect in such material respects as the erection of poles and wires, the mutilation of shade trees, and the changing of the grade, under the authority of public officers and uncontrolled by the municipalities, had not come into existence. In the earlier statutes authorizing the transmission of intelligence by electricity, provision for damages to abutting land owners was made, and when through a decision of this court a defect in the relief thus afforded was pointed out (*Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7), the evil was remedied by a new statute at the next session of the general court. Additional enactments have been passed so that now the abutting land owner is afforded ample remedy for any damages he may sustain through constructions in the highway by electric light, heat, power, telephone and telegraph companies. St. 1849, p. 62, c. 93, § 4; St. 1884, p. 306, c. 306; St. 1895, p. 395, c. 350; Rev. Laws, c. 122, §§ 4, 5, 6. An examination of the recent as well as earlier statutes governing the construction of street railways shows that the Legislature has not yet imposed



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a like liability upon street railways, notwithstanding the numerous recent decisions of this court, in which remediless injury to abutters has been pointed out. See, in addition to cases above cited, *McDermott v. Warren, Brookfield & Spencer St. Ry. Co.*, 172 Mass. 197, 51 N. E. 972; *Williams v. Old Colony St. Ry. Co.*, 193 Mass. —, 79 N. E. 484. St. 1894, p. 761, c. 548, authorizing the construction of the Boston Elevated Railway, however, contained ample provision as to damages to abutters. *Baker v. Boston Elevated*, 183 Mass. 178, 66 N. E. 711.

It only remains to inquire whether the condition in the location granted by the selectmen of Southboro to the defendant company, which required it to carry the highway over its tracks by a bridge, with the consequent change in grade, was legal. This location differs from that in the cases cited, in that it contemplated the crossing of the highway by the street railway at right angles, instead of a longitudinal construction within the way. The Legislature by St. 1901, p. 388, c. 455, authorized the defendant company in effect so to construct its railway between Boston and Worcester, that its tracks might lie largely outside the limits of public ways. It is probable that this statute did not extend the rights possessed by street railway companies organized under the general law to construct their tracks upon private lands. Whether this statute was anything more than a declaration of the general power possessed by street railway companies or not, its effect was undoubtedly to remove whatever doubt had theretofore existed as to the right of local authorities to grant locations to this street railway company to cross public ways substantially at right angles. If, however, the sole right of the defendant company to accept the location with its conditions granted it in Southboro rested upon this special statute, a different conclusion perhaps might be reached as to the plaintiff's rights. We assume upon the authority of *Farnum v. Haverhill & Andover Street Railway Co.*, 178 Mass. 300, 59 N. E. 755, that the selectmen of Southboro were authorized to grant the defendant company a location to cross Center Road substantially at right angles, apart from St. 1901, p. 388, c. 455. A corollary of this proposition is that the defendant company was empowered to operate its street railway by the use of passenger cars which in size and speed might rival those of steam railroads. The crossing of public ways at grade by cars of this character driven at high rates of speed inevitably adds to the danger of life and limb of travelers upon the street railway as well as upon the highway. It had become the settled policy of the commonwealth long before the granting of the location in question to abolish crossings at grade of steam railroads and highways. St. 1890, p. 463, c. 428, St. 1906, pp. 519-523, c. 463, pt. 1, §§ 29 to 45. By chapter 440, p. 348, St. 1902 (St. 1906, pp. 519, 520, c. 463, pt. 1, §§ 29, 34, 35), which was enacted prior to the work complained of by the present plaintiff, street railway companies having locations in highways affected by the abolitions of highway grade crossings with steam railroads

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were made proper parties to the proceedings for abolition, and might be compelled to pay a part of the expense. In view of this policy of the commonwealth, in pursuance of which millions of dollars have been paid out of the public treasury already, the wisdom of the action of the selectmen of Southboro, in requiring the defendant company to carry its track under the highway, and in not permitting a crossing at grade, cannot be questioned. The condition imposing upon the defendant company the obligation of raising the highway not exceeding seven feet at the highest place for this purpose was reasonable and legal and was for the purpose of promoting the security of those lawfully traveling upon the highway. In its last analysis it is simply an exercise of the easement of travel.

Giving due weight to all these considerations, it must be held that the injury which the plaintiff has suffered falls within the decision of *Callender v. Marsh, supra*, and the numerous other cases which we have reviewed respecting street railway constructions in highways, and no right of action exists for it. The Legislature by St. 1903, p. 522, c. 476, § 2 (St. 1906, p. 604, c. 463, pt. 3, § 47), has now provided in a general law for the crossing either over or under the public way, by street railway tracks, and the payment of damage by the street railway company to the abutting land owners. *Gardiner v. Boston & Worcester, R. R. Co.*, 9 Cush. 1. But this statute has no application to the case at bar.

The location granted by the selectmen of Southboro contained no provision that abutting land owners should be compensated by the street railway for injuries sustained by them. Therefore the validity of such a clause is not before us. Rev. Laws, c. 112, § 44, has no application to the case at bar. *Larce v. Northampton Street Ry. Co.*, 189 Mass. 256, 75 N. E. 255.

The report does not disclose the length of highway wherein the grade was raised opposite land owned by the plaintiff. If the original way was substantially level, the distance may at most have been about 156 feet on each side of the bridge, for the gradient of approach to the bridge was required by the location to be not over  $4\frac{1}{2}$  per cent. and the maximum elevation 7 feet. The plaintiff's real estate was a farm and she had sold to the defendant company land adjacent to that part of the highway where the bridge was constructed. She formerly had a rough roadway from that point on Center Road to her back land. The change in grade cut off this roadway. But at the plaintiff's request a substitute roadway was built coming near her barn. So far as appears this substitute roadway provided as easy access as the former one. It is not a necessary inference from these facts, taking into account the general character of the land affected as being a part of a larger farm, that there was occasioned by the conditions of the location an unreasonable interruption of the plaintiff's right of access to the highway in proper places. It may still be an open question whether upon sufficient proof of proper access from abutting property

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to the highway being cut off by acts of the kind here complained of, so that, considering the nature of the real estate and the uses to which it was reasonably suited, it could not be adapted to the improvement of which it was capable, a land owner might not seasonably secure relief in a proper form of remedy. *Eustis v. Milton St. Ry. Co.*, 183 Mass. 586, 67 N. E. 663; 2 Abbott on Municipal Corporations, §§ 817, 818, 820, and cases cited; Lewis on Eminent Domain, § 91, e, f, g. and h, and cases cited.

The plaintiff contends that a construction of the statute which goes to the extent of authorizing the selectmen to permit a change of grade for the purposes revealed in this case without compensation, is unconstitutional. This argument proceeds upon a misconception as to the principles by which damages for the laying out of highways have always been determined in this commonwealth. *Callender v. Marsh*, 1 Pick. 418, *supra*, was a case of even greater apparent hardship to the plaintiff than the present, and the question of constitutionality, although duly raised, was decided adversely to the plaintiff. At page 432 Chief Justice Parker used this language: "When rightfully laid out, they (highways and public streets) are to be considered as purchased by the public of him who owned the soil. and by the purchase the right is acquired of doing everything with the soil over which the passage goes, which may render it safe and convenient; and he who sells may claim damages, not only on account of the value of the land taken, but for the diminution of the value of adjoining lots, calculating upon the future probable reduction or elevation of a street or road. \* \* \* And he who purchases lots so situated, for the purpose of building upon them, is bound to consider the contingencies which may belong to them." The rule of damages was again fully discussed and stated in the recent case of *Como v. Worcester*, 177 Mass. 543, 59 N. E. 444, where, at page 548 of 177 Mass., at page 446 of 59 N. E., it was said by Knowlton, J.: "In estimating the damages for the taking of the land, the value of the easement which holds it for a public use for the purpose of a street forever is to be included. The city may use it as a street in any proper way, without making further compensation. except as statutes provide additional compensation for damages growing out of certain specified changes in the use. \* \* \* The owner of the fee may use the street in any way which is not inconsistent with the paramount right of the public to use it, and this paramount right may include the laying of gas or water pipes, of sewers, of street railway tracks, the setting of posts for the support of electric wires, or any other use of a public nature which is incident to the location and maintenance of the street. \* \* \*" See, further, *Boston v. Richardson*, 13 Allen, 146, 159; *Cassidy v. Old Colony R. R. Co.*, 141 Mass. 174, 177, 5 N. E. 142; *Lincoln v. Com.*, 164 Mass. 1, 10, 41 N. E. 112. When the ascertainment of compensation to the owner for the appropriation of land for a public way always has been, by the law of the land, determined upon this justly

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liberal rule, it cannot be said that any provision of the Constitution has been violated by any reasonable use for highway purposes of land so appropriated, which the advance of civilization may render proper. Land so appropriated cannot be given over to other uses than those of public travel. But so long as the purpose is public travel by reasonable devices, the land owner has already received his "just" (Const. U. S. Amend, art. 5) and "reasonable" (Const. Mass. pt. 1, art. 10) "compensation," save in those instances where a new recovery of damages occasioned by changes is permitted by statute. This has been the uniform current of adjudication by this court. *Attorney General v. Metropolitan R. R. Co.*, 125 Mass. 515, 23 Am. Rep. 264; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Howe v. West End St. Ry. Co.*, 167 Mass. 46, 44 N. E. 386; *White v. Blanchard Bros. Granite Co.*, 178 Mass. 363, 59 N. E. 1025; *N. E. Telephone & Telegraph Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835; *Eustis v. Milton St. Ry. Co.*, 183 Mass. 586, 67 N. E. 663; *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577.

We are therefore constrained to rule in favor of the defendant company leaving the plaintiff to such relief as she may be able to secure elsewhere. That it might be proper for the Legislature, by some general law, to provide compensation at the cost of the street railway companies, whose acts occasioned the injury, for losses of the kind complained of in this and the other recent cases of damage which have been hereinbefore discussed, is not for us to deny, but without such legislative provision, the court can afford no relief.

The plaintiff waived her exceptions to the direction of the verdict in favor of the defendants Shaw, and the defendants have not contended that the direction of the verdict in favor of the plaintiff against the defendants Rowe and Perini was not correct. The judgments are therefore to be entered in accordance with the rulings of the superior court, and it is

So ordered.

**NIEMYER v. WASHINGTON WATER POWER CO.**

(Supreme Court of Washington, Dec. 27, 1906.)

[88 Pac. Rep. 103.]

**Street Railroads—Operation—Actions for Injuries—Questions for Jury—Contributory Negligence.\***—In an action against a street railroad company to recover for injuries, whether plaintiff was negligent in driving on defendant's track without looking at the moment he was about to drive on the track is for the jury, where plaintiff looked and listened while in the block next to the crossing, the crossing being a diagonal one, so that plaintiff's back was partially turned towards the approaching car, and it was nighttime and difficult to distinguish a car headlight from other lights, and the contour of the ground made it impossible to see the car for a great distance from the crossing.

**Same.†**—The requirement as to looking and listening before crossing a railroad track is not applicable to persons crossing a street railroad track.

**Appeal—Harmless Error—Instructions.**—Where certain individual instructions are inaccurate, but, when read in connection with the other instructions, were not misleading, and the substance of most of the requested instructions was given and the omission did not prejudice appellant, the errors will be deemed harmless.

**Same—Attorney as Witness for Adverse Party—Cross-Examination.**—Where an attorney for plaintiff in an action for personal injuries is called as a witness by defendant, cross-examination by plaintiff to an extent not justified by the direct examination, and developing evidence which he could have introduced by calling the witness himself, is harmless error.

**Trial—Instructions—Damages—Medical Services—Evidence.**—In an action to recover for personal injuries, it is not error to instruct that

\*For the authorities in this series on the subject of the care required of those driving other vehicles in streets on which street cars are operated, see foot-notes appended to *Birmingham Ry., etc., Co. v. Clarke* (Ala.), 21 R. R. R. 618, 44 Am. & Eng. R. Cas., N. S., 618; foot-notes appended to *Kennedy v. Kansas City, etc., R. Co.* (Mo.), 21 R. R. R. 818, 44 Am. & Eng. R. Cas., N. S., 818; *Kennenberg v. Conestoga Traction Co.* (Pa.), 21 R. R. R. 80, 44 Am. & Eng. R. Cas., N. S., 80; foot-notes appended to *Indianapolis St. Ry. Co. v. Marschke* (Ind.), 20 R. R. R. 609, 43 Am. & Eng. R. Cas., N. S., 609; *Timber v. Philadelphia Rapid Transit Co.* (Pa.), 20 R. R. R. 500, 43 Am. & Eng. R. Cas., N. S., 500.

†For the authorities in this series on the question whether the stop, look, and listen rule applies to street railway crossings, see foot-notes appended to *Kannenberg v. Corestoga Traction Co.* (Pa.), 21 R. R. R. 80, 44 Am. & Eng. R. Cas., N. S., 80; foot-notes appended to *Timber v. Philadelphia Rapid Transit Co.* (Pa.), 20 R. R. R. 500, 43 Am. & Eng. R. Cas., N. S., 500; foot-notes appended to *Bartlett v. Worcester Consol. St. R. Co.* (Mass.), 20 R. R. R. 267, 43 Am. & Eng. R. Cas., N. S., 267.

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the jury may allow plaintiff expenses for medical attention "if any is shown by the testimony in the case," although there was no evidence as to the value of such services.

Appeal from Superior Court, Spokane County; Miles Poin-dexter, Judge.

Action by Charles W. Niemyer against the Washington Water Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*H. M. Stephens*, for appellant.

*Kenyon & Setters*, for respondent.

Root, J. Respondent while driving across the street railway track of appellant was struck and injured by one of its cars. From a judgment for damages on account of said injury, this appeal is prosecuted.

Respondent testifies that before attempting to cross the track he looked around and listened, looked ahead and back and in every direction; that, while "in the block" before crossing, he "looked back" two or three times; that he did not see or hear any car approaching before attempting to cross the track; that he did not know the car was coming until he was partly across the track, and he then hurried to get off; that the car was probably 50 or 75 feet when he discovered it and going "pretty fast"; that he was thrown from his wagon and knocked senseless, the car having struck one of the hind wheels of his wagon; that the accident occurred at about 10 o'clock p. m. or a few minutes thereafter; that it was a starlight night, and not very dark. The motorman upon the car testified that he saw a dust arising such as would be occasioned by a wagon passing along, but supposed that it would get off the track, and could not see that it was not so doing until within about 50 feet, and too close to avoid a collision.

Appellant urged, first, that the complaint does not state facts sufficient to constitute a cause of action, because it alleges that the motorman saw, or by the exercise of ordinary care could have seen, the respondent in time to have avoided the accident, and insists that, if the motorman saw or could have seen the respondent, the latter could likewise have seen the approaching car and avoided it. Possibly and probably the respondent could have seen the approaching car had he looked at the moment he was about to cross the track, or while entering thereupon; but this fact in itself was not sufficient as a matter of law to establish negligence or contributory negligence on the part of respondent. It was in the nighttime, and respondent was crossing the track in a diagonal course, with his back partially towards the approaching car. There was evidence tending to show that by reason of the contour of the ground an approaching car could not be seen for a great distance from this crossing. All of these matters, together with the fact that it is sometimes difficult to distinguish the headlight of a car in the nighttime



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from other lights or to judge with any degree of certainty of its distance or of the rapidity of its approach, present a question for the jury as to whether or not, under all the circumstances, the respondent acted as a reasonably prudent and careful man might have done under the same circumstances. What we have here said is determinative, also, of appellant's contention that a motion for a directed verdict should have been rendered by the trial court.

It is urged by appellant that this case is controlled by *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997. This contention cannot be upheld, as that was a case having to do with a steam railway crossing; the "look and listen" requirement being there applicable, but not applying to a person crossing a street railway. *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184; *Burian v. Seattle Electric Co.*, 26 Wash. 606, 67 Pac. 214; *Chisholm v. Seattle Electric Co.*, 27 Wash. 237, 67 Pac. 601; *Tacoma R. & Power Co. v. Hays*, 110 Fed. 496, 49 C. C. A. 115.

Appellant excepts to the giving of numerous instructions, and also takes an exception in each instance to the action of the trial court in refusing to give certain instructions by it requested. We have examined all of these, and believe that no prejudicial error was committed. The charge, taken as a whole, presented the case fairly to the jury; and while there may have been some which, considered individually, were to a certain extent inaccurate, yet we do not think they were, when taken in the light of all the instructions, capable of misleading the jury or prejudicing the rights of appellant. As to instructions requested and refused, the substance of most of these was contained in the instructions given, and we do not think that the omission of any other portion can be said to have been prejudicial to appellant. *Henry v. Grant Street Elec. R. Co.*, 24 Wash. 246, 64 Pac. 137.

One O. B. Setters, one of respondent's attorneys, was called as a witness by the appellant, and was cross-examined at some length by respondent's counsel. It is strongly urged that this cross-examination constituted error, in that it was not confined to the matters touched upon in the direct examination. Respondent meets this with the assertion that the error, if any, was invited by appellant, and contends that, if the rulings of the court were wrong, they were not such as to constitute reversible error. While this cross-examination was doubtless permitted to an extent greater than was justifiable, we are constrained to believe that it was not prejudicial error. The direct examination showed the witness to have been present when the accident occurred. It then became advisable for respondent to show what he knew of the matter. He could have done this by making the witness his own by permission of the court, but proceeded to develop the facts on cross-examination. This was irregular; but, in the light of all the circumstances, we do not think it justifies a reversal of the judgment. *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209.

**Skinner v. Tacoma Ry. & P. Co**

It is especially contended by appellant that the court was in error in giving an instruction wherein it told the jury that, if their verdict was favorable to plaintiff, they might allow him such expenses as he had incurred for medical attention, "if any is shown by the testimony in the case." It is claimed that this is error for the reason that there was no evidence as to the value of the medical services rendered to respondent. By virtue of former decisions of this court, it may be said that this did not constitute error. *Cole v. Seattle, Renton & Southern Railway Company*, 42 Wash. 462, 85 Pac. 3; *Webster v. Seattle, Renton & Southern Railway Co.*, 42 Wash. 364, 85 Pac. 3; *Eggleston v. Seattle*, 33 Wash. 671, 74 Pac. 806.

No reversible error appearing in the record, the judgment of the superior court is affirmed.

MOUNT, C. J., and CROW, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

**SKINNER v. TACOMA RY. & POWER CO.**

(Supreme Court of Washington, March 30, 1907.)

[89 Pac. Rep. 488.]

**Street Railroads—Injury to Persons Crossing Track—Contributory Negligence.**—In an action for injuries received in collision with a street car on a dark night, evidence held to show plaintiff guilty of contributory negligence.

**Same—Crossing Streets.\***—In the absence of legislative requirements, if a motorman has no occasion to foresee danger to another at a street crossing, it is not negligence to maintain the usual rate of speed over a crossing.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Lafayette Skinner against the Tacoma Railway & Power Company. From a judgment for plaintiff, defendant appeals. Reversed, and case ordered dismissed.

*B. S. Grosscup and Fitch, Jacobs & Baker*, for appellant.

*Ellis & Fletcher and A. H. Denman*, for respondent.

MOUNT, J. The plaintiff recovered a judgment against the appellant for \$2,000, on account of injuries received by reason of one of the appellant's street cars striking and dragging the plaintiff along K street in the city of Tacoma. Defendant appeals from that judgment.

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\*For the authorities in this series on the subject of the care required of those in charge of street cars to regulate the speed of cars, to prevent collisions with other users of streets, see foot-notes appended to *Beier v. St. Louis Transit Co. (Mo.)*, 22 R. R. R. 281, 45 Am. & Eng. R. Cas., N. S., 281.

**Skinner v. Tacoma Ry. & P. Co**

The respondent alleged that the appellant was guilty of negligence, by reason of its servants driving an electric car at a high and reckless rate of speed, passing another car on a parallel track at a street crossing without slacking speed or ringing a bell or holding said car under control at said place. The answer denied any negligence of the company, and alleged contributory negligence of the respondent. The facts, as shown by respondent's witnesses, are, in substance, as follows: K street runs north and south in the city of Tacoma. The appellant operates a line of street railway along this street, and maintains a double track between South Sixth street and South Eleventh street which cross K street at right angles. The westerly track is used for south-bound cars, and the easterly track for north-bound cars. The meeting point of all cars was upon these double tracks, usually between South Seventh and South Eighth streets. K street is straight and level along the whole length of the double tracks. Respondent had lived for more than 2½ years on the west side facing K street, between South Seventh and South Eighth street. He was familiar with the running of the cars. His house was about 200 feet south of South Seventh street, the block between Seventh and Eighth streets being about 340 feet long. On October 15, 1905, between 7 and 8 o'clock in the evening, respondent, in company with a grown daughter, undertook to cross K street, going west on the crossing at the intersection of South Seventh street, on the south side thereof. The night was quite dark. There were no street lights near. The respondent and his daughter stood on the southwest corner of the block until the south-bound car passed. Immediately thereafter they started to walk across the street, picking their way in the mud and water which were upon the crossing. They did not see or hear the north-bound car which was coming. The car was lighted and running not more than 9 miles per hour, which was within the limit of speed allowed by the city ordinance. Respondent and his daughter both stepped upon the east track when the approaching lighted car was within about 10 feet of them, respondent being between his daughter and the car. As soon as they stepped upon the track, the daughter saw the car, and immediately stepped back and called to and caught at her father, but before he could escape the car struck him. As soon as the motorman saw the respondent and his daughter step into the light of the car on the track, he tried to stop his car, but was unable to do so in time to avoid the accident. The respondent was a man 81 years of age, but unusually spry and active for a man of his age. There is some evidence that the car was going "fast" and at a "pretty rapid rate," making no noise. But there is no evidence whatever that the car which struck respondent was running at an unusual or dangerous rate of speed, or that the other car was at or even near the crossing. There is no evidence in the record that the appellant was negligent, except the mere fact that the accident occurred. The respondent's evidence shows that the accident could not have been avoided after respondent stepped

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upon the track in front of the car, unless the car had been moving slowly enough to be stopped within the space of 10 feet. The south-bound car had passed the crossing before respondent and his daughter started to cross the street. The track which the north-bound car was using was at least 30 feet from respondent when he started to cross the street. Respondent walked slowly, picking his way across the street. The two cars, therefore, must have met each other some considerable distance south of the crossing, and from that meeting point the north-bound car was in open view of respondent and his daughter, coming towards them with all its lights burning. It was not shown that the motorman could or did see respondent or his daughter until they had stepped into the light upon the track; but if we may suppose he could see them and did so before they walked upon the track, he had a right to assume that they would be ordinarily careful and not step upon the track in front of his car, and it was not necessary for him to stop his car until he saw them in apparent danger. *Duteau v. Seattle Electric Co.* (Wash.) 88 Pac. 755.

It is claimed, however, that it was the duty of the motorman to have his car under control at street crossings so that he might stop there for passengers. The only evidence that the car was not under such control was the fact that the car was not actually stopped until it had crossed beyond Seventh street. The custom was to stop on the side opposite where the respondent was injured. There was no one upon the opposite crossing, and, on account of being a dark street, it was seldom used by passengers intending to take the car, and the motorman did not intend to stop there for that reason. If it is the rule that cars must be under control at street crossings, this control, in the absence of legislative requirements, must be a reasonable control, depending upon the circumstances, and not an absolute control so that a car may be stopped immediately under all circumstances. If the motorman sees a clear track and has no occasion to stop and no reason to anticipate danger to another, it would not be negligence to maintain the usual rate of speed, even over a crossing. But if he sees, or ought to see, persons or vehicles thereon, not able to get out of his way readily, it would certainly be negligence not to have such control of his car as to be able to stop before reaching such crossing. This case is one where there appeared to be no occasion for stopping at that time. We think the appellant's motion for nonsuit should have been sustained upon the ground that no negligence of the appellant was shown.

There certainly can be no doubt that the respondent was guilty of contributory negligence when he deliberately walked in front of appellant's car. The respondent knew that the cars usually met upon that block. He was familiar with their running time. He saw the south-bound car pass. The night was dark, no lights nearby except the light of the car. Yet he carelessly walked upon the track, within 10 feet of an approaching car with all its lights burning. He stepped directly into the rays of the headlight of the car. There was nothing to obstruct his view. We think there

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car be no dissenting opinion that this was negligence which caused his injury. The trial court should have therefore refused to submit the case to the jury. *Coats v. Seattle Electric Co.*, 39 Wash. 386, 81 Pac. 830; *Criss v. Seattle Electric Co.*, 38 Wash. 320, 80 Pac. 525; *Anson v. Northern Pacific Ry. Co.* (Wash.) 87 Pac. 1058.

The judgment is therefore reversed, and the case ordered dismissed.

HADLEY, C. J., and FULLERTON, ROOT, CROW, DUNBAR, and RUDKIN, JJ., concur.

**CHICAGO, I. & L. RY. CO. v. MCCANDISH.**

(Supreme Court of Indiana, Jan. 15, 1907.)

[79 N. E. Rep. 903.]

**Railroads—Crossing Accident—Action—Pleading.\***—In an action for the death of a person from injuries on a railroad crossing, plaintiff was bound to aver facts disclosing a legal duty owed by the defendant, and the negligent performance or negligent failure to perform such duty, in order to state a cause of action requiring the defendant to answer.

**Same—Care Required—Licensee—Trespassers.†**—While the employees of a railroad company are required to exercise ordinary care for the safety of travelers while using a grade highway crossing such employees are only required not to willfully injure trespassers or mere licensees thereon.

**Same—Pleading.**—In an action for death of plaintiff's intestate while on a railroad grade crossing, the complaint averred that decedent saw defendant's train coming, and stopped on a side track between certain standing cars to await the passage of the train; that a car was negligently switched onto the side track so as to cause the two sections of cars on the switch to come together, by which intestate was killed. The complaint did not allege intestate's destination, or that he intended to pass over the crossing, nor that he was on the highway at the time he was injured. Held, that the complaint

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\*For the authorities in this series on the subject of the care due licensees and trespassers on railroad tracks, see extensive note appended to *Brown v. Boston & M. R. R.*, 213, 44 Am. & Eng. R. Cas., N. S., 213; *Smith's Adm'r v. Illinois Cent. R. Co.* (Ky.), 21 R. R. R. 802, 44 Am. & Eng. R. Cas., N. S., 802; foot-notes appended to *Wilkie v. Richmond Traction Co.* (Va.), 21 R. R. R. 659, 44 Am. & Eng. R. Cas., N. S., 659.

†For the authorities in this series on the subject of pleading negligence as a cause of action, see foot-notes appended to *Southern Ry. Co. v. Blanford* (Va.), 21 R. R. R. 646, 44 Am. & Eng. R. Cas., N. S., 646; *McAndrews v. Chicago, etc., Ry. Co.* (Ill.), 21 R. R. R. 102, 44 Am. & Eng. R. Cas., N. S., 102; *Grand Trunk Western Ry. Co. v. Melrose* (Ind.), 21 R. R. R. 11, 44 Am. & Eng. R. Cas., N. S., 11; foot-notes appended to *Birmingham Ry., etc., Co. v. Jones* (Ala.), 20 R. R. R. 568, 43 Am. & Eng. R. Cas., N. S., 568.

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was fatally defective for failure to show that decedent was a traveler at the time he was injured, and in that ordinary use of the highway which entitled him to the exercise of ordinary care on the part of the railroad company.

Appeal from Circuit Court, Porter County; Willis C. McMahan, Judge.

Action by Harry McCandish, as administrator of the estate of James Bragg, deceased, against the Chicago, Indianapolis & Louisville Railway Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from the Appellate Court, under the provisions of Burns' Ann. St. 1901, § 1337u. Reversed with directions.

*E. C. Field* and *H. R. Kurrie*, for appellant.

*Lemuel Darrow* and *H. W. Warden*, for appellee.

MONTGOMERY, C. J. Appellee, as administrator, brought this action to recover damages for the death of James Bragg. The complaint, omitting the caption and prayer, is as follows: "The plaintiff complains of the defendant, and for this cause of action avers and says that he was duly appointed by the La Porte circuit court as administrator of the estate of James Bragg, on the 9th day of July, 1903. That the defendant is and was at the time hereinafter mentioned a corporation duly organized under the laws of the state of Indiana, and owned and operated a railroad known as the "Chicago, Indianapolis & Louisville Railroad, over, through, and across the county of La Porte and other counties in the state of Indiana. That said railroad was constructed across the highway in Dewey township, La Porte county, Ind., immediately west of the village of La Crosse, Ind. That said highway over which said railroad is constructed is fifty (50) feet wide, twenty-five (25) feet on each side of the center of the traveled track of said highway. That across said highway and at right angles therewith is located the main line of said defendant company's track. Immediately east of said track is located a side track. That the side track was on the 20th day of June, filled with box cars on both sides of the highway extending from the center of said highway to within a few feet of the switch connecting the side track with the main line of said defendant company, which connection of said side track with the main line is immediately north of the highway aforesaid, where the same crosses the side track and main track of the said defendant. That said cars were allowed to remain on said side track from the 20th day of June, 1903, up to and until and after the injuries hereinafter complained of. That the defendant company unlawfully and carelessly suffered and permitted the cars on said side track to be and remain on the highway within ten (10) feet of the center of the traveled track from June 20, 1903, until June 23, 1903, and there remain a space of but twenty (20) feet for the traveling public to go to and fro over and across said side track of said defendant company at the point where the side track



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crosses the public highway. That on the 22d day of June, 1903, James Bragg was on the east side of said railroad on the public highway moving westward near that point where the side track crosses said highway, and was approaching the main line of the said defendant company, at which time an engine of the company was rapidly approaching the crossing on the main line from the north. That, at the time said Bragg was nearing the main line of said defendant company, said James Bragg saw said engine and train of cars rapidly approaching from the north, before he, the said Bragg, had crossed said main line, and he, the said James Bragg, to avoid injury from said engine and train of cars, stopped, and was standing on the side track, awaiting the passage of said engine and train. That the defendant company carelessly and negligently allowed a car to be cut loose from said train that was approaching on the main line, and by turning the switch, which was located immediately north of the said highway, carelessly and negligently threw said car with great force in and on said side track. That said car so thrown in and on said side track aforesaid caused the cars that were standing in the highway, ten (10) feet from the center of the traveling track aforesaid, to move rapidly forward across the public highway with great force, and momentum, and said cars struck the said James Bragg and cut, bruised, crushed, and mangled said James Bragg and injured him, the said James Bragg, from which injuries the said James Bragg sickened and died, which said cars so thrown in the said side track were unaccompanied by an agent or servant, or any person, of said railroad company, and which were thrown in without any signal or warning to the said James Bragg, or any other person or persons. That the said James Bragg was an able-bodied man at the time of such injuries, and earned one dollar and seventy-five (\$1.75) cents per day. That the said James Bragg left surviving him a widow and two (2) children, both girls, and now of the ages of seven and nine years, and by reason of the carelessness and negligence of the defendant company, and without any fault on the part of the said James Bragg, the said widow is left without, and deprived of, her husband and support, and said children have been deprived of a father and support, to their damage in the sum of twenty thousand dollars (\$20,000)." Appellant's demurrer to this complaint, for want of facts, was overruled, and this ruling, assigned as error, presents the first question for our consideration.

In the class of cases to which this belongs, the plaintiff is required to aver in his complaint such facts as disclose a legal duty owing by the defendant, and a negligent performance or negligent failure in the performance of such duty. *Pittsburgh, etc., R. Co. v. Peck*, 165 Ind. 537, 540, 76 N. E. 163, and cases cited. The facts creating the duty should be alleged with such fullness and certainty as to make plain an obligation of duty, and to indicate its character. The employees of a railroad company are required to exercise ordinary care for the safety of travelers while in the use of grade crossings of a highway and railroad, but

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they are only required not to injure willful trespassers and mere licensees while upon the right of way of the company. Public highways are established and maintained for the use of travelers, and it is manifest that the duty owing by railway company to a traveler or passer over a grade crossing is very different from that owing to a mere licensee while upon the same crossing.

It is averred in the complaint that the decedent approached the crossing from the east, saw the engine and cars coming, and stopped on the side track to avoid injury and await the passage of the engine and train. His destination is not stated, nor is it averred that he intended to pass over the crossing at the time of the accident. He may have been drawn toward the crossing by curiosity, and entered upon the right of way intending to turn back or go northwardly or in a southernly direction, so far as the averments of the complaint advise us. It is not in terms alleged that he was upon the highway at the time he was injured, but that fact is shown only by inference. It was not essential to show that he was on his way home, or on an errand of business; but it should be shown by proper averment, if true, that he was intending and about to use the crossing as a traveler or passer over and along the public highway. If in point of fact the decedent was prior to and at the time of the accident loitering about the crossing, or seeking shelter from the rain under the cars, he would be required to look out for his own safety, and would not be in position to exact of appellant that care which is due to a traveler in the ordinary use of the crossing. In pleading, facts must be directly and positively averred, and the necessary elements to constitute a cause of action will not be supplied by inference and intendment. *La Porte Carriage Co. v. Sullender*, 165 Ind. 290, 75 N. E. 277; *Pittsburgh, etc., Co. v. Peck*, 165 Ind. 537, 76 N. E. 163. In actions for injuries caused by the defective condition of premises it is necessary to allege by what right the person injured was upon the premises at the time of receiving his injury. *South Bend Iron Works v. Larger*, 11 Ind. App. 367, 39 N. E. 209; *Thiele v. McManus*, 3 Ind. App. 132, 28 N. E. 327; *Mathews v. Bensel*, 51 N. J. Law, 30, 16 Atl. 195; *Maenner v. Carroll*, 46 Md. 193. It is equally essential in cases of this character to show the exact relation between the parties from which the duty declared upon arises. In our opinion the complaint before us does not show that the decedent was a traveler or passer over the highway crossing at which the injury occurred, and in that ordinary use of the same which entitled him to recover for a personal injury inflicted by the negligence of appellant. It follows that the court erred in overruling appellant's demurrer to the complaint.

The judgment is reversed with directions to sustain the demurrer to the complaint, and grant leave to amend if desired.

CHESAPEAKE & O. R. CO. *v.* RICHARDSON.

(Court of Appeals of Kentucky, Feb. 12, 1907.)

[99 S. W. Rep. 642.]

**Railroads—Fires—Action—Evidence—Sufficiency.\***—Where, in an action against a railroad for damages to plaintiff's house by fire communicated from defendant's locomotive, it appeared that the house was 100 feet from the track, and that locomotives, all equipped with the same kind of screens, had thrown out large cinders and set the house on fire a day or two before, it was sufficient to show negligence.

**Same—Admissibility of Evidence.\***—In an action against a railroad for damages to plaintiff's house by fire communicated from defendant's locomotive, it appearing that the locomotives were all under one management and the same kind of screens used in them all, evidence is admissible to show that cinders were thrown out by other locomotives than the one in question or that fires were set by them about the same time.

**Same—Instructions.†**—In an action against a railroad for damages to plaintiff's house by fire communicated from defendant's locomotive, the court instructed that, though the jury might believe that the fire was caused by sparks emitted from defendant's engine, yet, if the engine was equipped with the best and most approved screens and spark arresters in practical use and in perfect order, the verdict should be for defendant, unless the engine was operated by the servants in charge of it in a careless and negligent manner, whereby the sparks were emitted. Held, that the instruction was proper.

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Action by Tom Richardson against the Chesapeake & Ohio Railroad Company from a judgment in favor of plaintiff, defendant appeals. Affirmed.

*Ira Julian and Jno. T. Shelby*, for appellant.

*Wm. Cromwell and Jas. T. Burford*, for appellee.

HOBSON, J. Tom and Kate Richardson own a house and lot near Hoge's Station on the Louisville & Nashville Railroad. In

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\*See foot-notes appended to *Illinois Cent. R. Co. v. Bailey* (Ill.), 21 R. R. R. 664, 44 Am. & Eng. R. Cas., N. S., 664; *Knott v. Cape Fear & N. Ry. Co.* (N. Car.), 21 R. R. R. 127, 44 Am. & Eng. R. Cas., N. S., 127.

†For the authorities in this series on the subject of the effect of the exercise by defendant of due care in furnishing spark arresters and in operating locomotives, see foot-notes appended to *Williams v. Atlantic Coast Line R. Co.* (N. Car.), 20 R. R. R. 522, 43 Am. & Eng. R. Cas., N. S., 522. See also, foot-notes appended to *Louisville, etc., R. Co. v. Sullivan Timber Co.* (Ala.), 13 R. R. R. 836, 36 Am. & Eng. R. Cas., N. S., 836.

**Chesapeake & O. R. Co. v. Richardson**

April, 1905, the house caught fire and burned down, and Tom Richardson brought this suit against the Chesapeake & Ohio Railway Company to recover for its loss, alleging that it was negligently set on fire by one of its trains. The case was tried by a jury, who found for plaintiff in the sum of \$225. The court entered judgment on the verdict, and the defendant appeals.

It is earnestly insisted for the railroad company that the house was not set afire by its train, and, while there are a number of witnesses whose testimony would show this, there are also other witnesses whose testimony shows that it was set afire by the train. The question of fact was fairly submitted to the jury by the court. It was simply a case depending on the credibility of the witnesses. The jury saw and heard the witnesses, and we cannot disturb their finding.

It is also earnestly insisted for the railroad company that there was no evidence of negligence on its part, and that it made out a *prima facie* case by showing that its engines were properly equipped with the best screen arrestors in use. There was evidence on the part of the plaintiff that the engines threw out large cinders, and had set this house afire only a day or two before, or set fire to a bale of hay on the back porch. The house was 100 feet from the railroad track, and, when a railroad engine throws out large cinders of sufficient size to carry fire 100 feet and set fire to a house, we cannot say that there was no evidence of negligence. It is settled that as the engines are all under one management, and the same kind of screens are used in all, proof is admissible of cinders thrown out by other engines, or fires set by them about the same time. *Mills v. L. & N. R. R. Co.*, 116 Ky. 309, 76 S. W. 29.

The court, after an instruction following the allegations of the petition, gave the jury the following instructions: "(1) Unless the jury believe from the evidence that the house of the plaintiff was destroyed by fire caused by sparks emitted from the engine of the defendant, they ought to find for the defendant. (2) Although the jury may believe from the evidence that the fire which destroyed plaintiff's house was caused by sparks emitted from the engine of defendant railroad company, yet, if they further believe from the evidence that the engine was equipped with the best and most approved screens and spark arresters, in practical use and in perfect order, they ought to find for defendant, unless they believe the engine was operated by defendant's servants, agents, or employees then in charge of it in a careless, negligent manner, by reason of which the sparks were emitted, and the house destroyed by reason of the sparks causing the fire." These instructions fairly and clearly presented to the jury the law of the case.

Judgment affirmed.

**GRACY v. ATLANTIC COAST LINE R. CO.**

(Supreme Court of Florida, Division B, Feb. 22, 1907.)

[42 So. Rep. 903.]

**Exceptions, Bill of—Incorporating Evidence—Appeal—Record.**—Under the proviso in rule 1 (37 South. x) for the preparation of bills of exceptions adopted in 1905, which creates an exception to the rule that the testimony shall be stated in narrative form, "every question to a witness which is the basis of some ground for reversal mentioned in the assignment of errors, with its answer, if any, shall be stated at length," and it is no ground of objection that such questions and answers are "scattered through the record." They may be inserted in that part of the narrative where they occur, in order of giving testimony.

**Appeal—Review—Harmless Error.**—If a question to a witness be improperly overruled, yet, if the witness in the course of his testimony fully answers the question, no reversible error is committed.

**Evidence—Opinion Evidence.**—Except where experts are being examined, a witness cannot be called upon to give an opinion upon facts testified to by other witnesses.

**Trial—Repetition of Testimony.**—A trial judge must exercise some discretion over the matter of the repetition of testimony, and, where this discretion is not unreasonably exercised, there is no error in his refusing to allow a witness to repeat his testimony.

**Same — Instructions — Abstract Propositions—Railroads—Fires.\***—A charge that "a railroad company, free from negligence, is not liable for damages from fire kindled by sparks or clinkers from locomotives," states a correct abstract proposition of law, and it is not error to give such a charge, especially when the question whether the railroad company was guilty of negligence was left to the jury by other appropriate charges.

**Same—Applicability to Issues.**—Where a declaration against a railroad company contains four counts charging that fire was set out by or from the engine in various ways, and issue is joined on pleas to all the counts, and it is shown that the plaintiff's property near the railroad was destroyed by fire, and the plaintiff does not inform the court, before the jury is charged, that he does not rely on some of the counts, and the defendant has introduced evidence tending to rebut the presumption that the fire was set out, as indicated in some of the counts, which the plaintiff now contends he did not insist on, the trial court commits no reversible error in giving correct charges applicable to those counts, for the court does not thereby vary or narrow the issues which the plaintiff by his pleadings submits to the jury.

**Same—Construction of Charge as a Whole.**—In determining whether an instruction is erroneous, it must be considered and construed to—

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\*See preceding case and foot-note.

**Gracy v. Atlantic Coast Line R. Co**

gether with and in the light of all the instructions and charges given, and if, when so considered, it was not calculated to mislead the jury, it does not constitute reversible error.

**Same—Objections to Instructions.**—A plaintiff cannot be heard to object to an instruction given at the instance of the defendant which is identical in purport with one given at his own instance.

**Railroads—Fires—Actions—Instructions.**†—An instruction that “the jury are not permitted to infer or presume, for want of positive truths to the contrary, that the fire was communicated by the operation of a railroad,” contains a correct proposition of law, inasmuch as it is the law, in cases like the one at bar, that the burden of proving, in the first instance, that the fire was caused by the defendant, was on the plaintiff, and this fact could not be presumed or inferred, without evidence to affirmatively support such presumption or inference.

**Appeal—Harmless Error.**—A plaintiff cannot complain of an instruction, given at the request of the defendant, limiting the finding of the jury to the net market value of the property of the plaintiff which was destroyed, when the verdict of the jury was for the defendant, and no new trial is awarded.

**Trial—Instruction.**—An instruction given out of the abundance of caution, so as to cause the jury to confine their investigation to the issues made by the pleadings, is not erroneous.

**Railroads—Fires—Assumption of Risk.\***—Those who establish themselves in the neighborhood of railroads must know that trains are expected to run upon them, and, if there are risks arising from no want of proper care in the equipment and management of engines and trains, those risks are not chargeable to the railroads, but are incidental to the situation; and where the foregoing proposition is substantially given in an instruction requested by the defendant railroad, and is accompanied by charges of the trial court to the effect that the care required of a railroad under such circumstances must be proportioned to the circumstances or the danger, the plaintiff cannot complain.

**Trial—Re-Reading Instruction.**—The trial judge commits no error in re-reading to the jury, at their request, one of the instructions which he had given them.

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†For the authorities in this series on the subject of the burden of proving that a fire which destroyed property near a railroad right of way originated from sparks from a locomotive, see *St. Louis, etc., Ry. Co. v. Coombs* (Ark.), 16 R. R. R. 480, 39 Am. & Eng. R. Cas., N. S., 480 (where an engine passed near inflammable material immediately before the discovery of the fire, the jury, in the absence of proof explaining its origin, may infer that it originated from sparks from the engine); presumption that company set fire did not arise from fact that its employees assisted in extinguishing it); note, 15 Am. & Eng. R. Cas., N. S., 518; *Paris, etc., R. Co. v. Nesbitt* (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 448.

For the authorities in this series on the question whether the fact that a fire was set by a railroad locomotive may be established by circumstantial evidence, see *Kearney County v. Chicago, etc., Ry. Co.* (Neb.), 21 R. R. R. 626, 44 Am. & Eng. R. Cas., N. S., 626.

\*See foot-note on preceding page.



**Gracy v. Atlantic Coast Line R. Co**

**Same—Excessive Number of Instructions.**—This court does not approve of the practice of requesting an unnecessarily large number of instructions to the jury. They are calculated to confuse and mislead a jury, cannot always be critically examined by the trial judge, afford unnecessary opportunities for error, and are burdensome to the courts. (Syllabus by the Court.)

Error to Circuit Court, Alachua County; James T. Wills, Judge.

Action by L. C. Gracy against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

L. C. Gracy, the plaintiff in error, hereinafter described as the "plaintiff," in June, 1905, brought a suit at law for damages against the Atlantic Coast Line Railroad Company, the defendant in error, hereinafter described as the "defendant," in the circuit court of Alachua county. The declaration contains four counts, and is in the following words:

"L. C. Gracy, by W. H. Palmer and Robt. E. Davis, his attorneys, sues Atlantic Coast Line Railroad Company, a corporation organized and existing under the laws of the state of Virginia, and operating a railroad in the county of Alachua, state of Florida:

"First Count. For that, whereas, the defendant was on the 9th day of April, A. D. 1905, and for a long time prior thereto had been, operating a railroad over and through the county of Alachua, from the station of High Springs, in said county, to and beyond the station of Rochelle, in said county, and used and run thereon, in the operation of its said business, certain engines and locomotives in which was burned coal or wood for fuel; that on said date, and for a long time prior thereto, the plaintiff was and had been operating a sawmill near the R. B. mile post of the defendant's said railroad, between the stations mentioned, known as 'Gracy's Mill,' and adjacent to the right of way of the defendant's said railroad; and on said date aforesaid had cut and stacked up on the yard of his said mill, the property of the plaintiff, near and adjacent to said right of way aforesaid, 150,000 feet of merchantable pine lumber, the property of the plaintiff, of the value of \$2,000.00.

"That on said date aforesaid the defendant, by certain of its agents and employees, so carelessly ran and managed one of its certain engines and locomotives aforesaid that sparks, fire, and live cinders were permitted to escape therefrom, and carelessly and negligently permitted the same to be communicated to and burn certain grass, weeds, and dry rubbish which the said defendant had negligently and carelessly permitted to accumulate along the line of its said right of way, near and adjacent to said lumber of the plaintiff, by means of which the said fire, by and through the carelessness and negligence of the defendant, and without fault upon the part of the plaintiff, did spread from the defendant's said right of way, and was communicated to, caught, fired,

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consumed, and destroyed the said lumber of the plaintiff aforesaid, to the damage of the plaintiff in the sum of \$2,000.00."

The second, third, and fourth counts of the declaration only vary from the first count in setting up the alleged negligence of the defendant, and in that regard they are as follows:

"Second Count. \* \* \* That on the said date aforesaid the defendant, by certain of its agents and employees, so carelessly and negligently ran and managed one of its certain engines and locomotives aforesaid that sparks, fire, and live cinders were permitted to escape therefrom, and by and through the carelessness and negligence of the defendant, and without fault upon the part of the plaintiff, was permitted to and did catch fire, consume, and destroy the said lumber of the plaintiff, to the damage of the plaintiff in the sum of \$2,000.00.

"Third Count. \* \* \* That on said date aforesaid certain of the agents and employees of said defendant carelessly and negligently emptied and discharged a large quantity of fire, fuel, and live cinders from one of the engines and locomotives of the said defendant upon the track and right of way of the said defendant, and carelessly and negligently permitted said fire, fuel, and live cinders to communicate to and burn certain grass, weeds, and rubbish which the said defendant had negligently and carelessly permitted to accumulate along the line of its said right of way, near and adjacent to said lumber of the plaintiff, by means of which the said fire, by and through the carelessness and negligence of the defendant, and without fault upon the part of the plaintiff, did spread from the defendant's said right of way, and was communicated to, caught, fired, consumed, and destroyed the said lumber of the plaintiff aforesaid, to the damage of the plaintiff in the sum of \$2,000.00.

"Fourth Count. \* \* \* That on the said date aforesaid certain of the agents and employees of said defendant carelessly and negligently emptied and discharged a large quantity of fire, fuel, and live cinders from one of the engines and locomotives of the said defendant upon the track and right of way of the said defendant, and carelessly and negligently permitted said fire, fuel, and live cinders to spread fire from the defendant's said right of way, and without fault upon the part of said plaintiff, carelessly and negligently permitted said fire to communicate to, catch, fire, consume, and destroy the said lumber of the plaintiff aforesaid, to the damage of the plaintiff in the sum of \$2,000.00.

"Wherefore the plaintiff claims that he hath been injured and claims damage in the sum of \$2,000.00."

The defendant pleaded "not guilty," and on a trial in December, 1905, the jury returned a verdict of not guilty, and a judgment was entered in favor of the defendant. From this judgment a writ of error was sued out from this court.

*W. H. Palmer and Robt. E. Davis*, for plaintiff in error.

*R. A. Burford and Carter & Layton*, for defendant in error.

HOCKER, J. (after stating the facts). Objection is made by the

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defendant to the consideration by this court of assignments numbered 1, 3, 4, 5, and 6, because, while the bulk of the testimony is given in the bill of exceptions in narrative form, yet these assignments are based on certain questions propounded to witnesses, which, with the answers, are scattered through the record. It seems to us that the objection made is untenable, and that the bill of exceptions in these particulars complies with the proviso in special rule 1 (37 South. x) to be observed in the preparation of bills of exception and transcripts of record, adopted in 1905.

The first assignment is based on the ruling of the court striking out the answer of the plaintiff to the following question: "Do you know what kind of fuel they were using in that engine that day? Ans. The engineer told me it was burning coal." Granting that the ruling was erroneous, yet no harm was sustained by the plaintiff, because in his testimony the engineer, Daniels, who was operating the engine on the day of the fire, states in his testimony: "My engine was burning coal that day—was burning good coal, and was steaming well."

The third assignment is based on the refusal of the court to permit the plaintiff on cross-examination to ask the engineer, Daniels, the following question: "Mr. Daniels, if a hot clinker that would set fire to little pieces of wood and trash in which it had fallen was found near that commissary that morning before your train got out of sight, how could you account for it?" Plaintiff's witnesses had testified to finding a burning clinker on the side track near the commissary on the morning before the fire where witness Daniels' train had been on the side track getting out a car at the mill of the plaintiff, and before his train had gotten out of sight. The witness had said that no clinkers had been put off his engine at that point. We see no error in the ruling of the court. The question called for the opinion of the witness upon facts given in testimony by other witnesses, and such a question is not permissible, under the authority of *Mann v. State*, 23 Fla. 610, 3 South. 207, except when experts are being examined.

The fourth assignment of error is based on the refusal of the court to permit plaintiff, Gracy, on rebuttal, to answer the following question: "You have heard the testimony of Mr. Jolly and others relative to this burned district. You have also testified that you were on the ground the day of the fire and the following day. I wish you would take this blue print and explain to the jury exactly what that burned district embraced."

The objection to the question was that it solicited testimony which had already been given by the witness. For the plaintiff it is contended that the "blue print" referred to was only introduced in connection with the testimony of the witness Jolly, who was the defendant's witness, after the plaintiff had been examined. It appears from the record that Mr. Gracy, upon cross-examination, had examined a "blue print" and had given evidence to the jury based on that examination. He refers in this evidence to the "burned district"—to the location of the clinkers and the extent of the burned district. On redirect examination, immediately

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following this cross-examination, he stated: "The area between the pencil lines indicated on this map is the burned district as I remember it." All this occurred before the question was propounded which forms the basis of this assignment. There is but one blue print or diagram, showing the location of the railroad track, mill, lumber piles, burned district, and the other local features of the situation at Gracy's mill, shown by the record.

A circuit judge must exercise some discretion over the matter of the repetition of testimony. The record does not show any special reason why Mr. Gracy should have been permitted to enter generally a second time into a discussion of the extent of the burned district, when he had gone into the matter with great detail in his previous testimony. We do not think error is made to appear under this assignment.

The fifth assignment is based on the refusal of the judge to permit the plaintiff, as a witness in his own behalf, to answer the following question, to wit: "When was it that you ascertained in your opinion that the lumber caught fire from the clinkers?" The plaintiff in his previous testimony had stated that he first thought the fire was set out by a pile of burning cross-ties. The lumber was burned on Sunday, and he arrived at the mill about the time the fire had been extinguished. It was then he formed this impression, which he had communicated to others. But on Monday following he went from Gainsville to the mill, arriving there about noon. He then re-examined and found clinkers on and near the railroad track, which had started fires, and formed the opinion that the fire which did the injury was set out by the hot clinkers. It seems to us that the question had been sufficiently answered.

The sixth assignment is based on the refusal of the court to permit plaintiff's witness, J. C. Stokes, to answer the following question, propounded to him by the plaintiff's attorney: "Look at this map, and explain to the jury what portion of the territory between the railroad and the burned lumber was burned over during that fire." The testimony of this witness immediately following the foregoing question plainly shows that the witness examined the map and testified at length as to what part of the territory between the railroad and the burned lumber was burnt over. It is not very easy to determine from this evidence what part of the territory was burned, but the witness himself construes it to mean "that the space between the fence (a wire fence on the right of way) and the lumber pile was burned off," but he could not say that it burned up to the track. Further along in his testimony this witness says, "The map is not practically correct as to the indications of the burned grass—not according to my idea," and indicated that the burned grass ought to be a little further in "that direction." The record does not clearly inform us what he meant by "that direction." He then almost immediately says, speaking of the map: "It may be right. I don't know. I am not able to say whether it extended beyond

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the crossing or not. The map may be all right as to the burned district." No error appears under this assignment.

The ninth assignment is based on the court giving the first instruction requested by the defendant, to wit: "A railroad company, free from negligence, is not liable for damages from fire kindled by sparks or clinkers from locomotives." The contention of the plaintiff is that, while the charge embraces a correct abstract proposition of law, so far as fires kindled by sparks are concerned, it is not correct when applied to clinkers from locomotives. No authority is referred to sustaining this contention, and no reason occurs to us, from the nature of "clinkers," which would make the general rule inapplicable to them. We think the court stated in this instruction a correct abstract proposition of law, for negligence is the basis of the plaintiff's claim. If there was no negligence on the part of the railroad company, the plaintiff has no claim. The question of negligence was appropriately to the jury by other instructions.

The tenth assignment is based on the second instruction given at defendant's request. It is as follows: "Railroad companies, being authorized by law to employ the powerful and dangerous agency of steam, are required to exercise all ordinary and reasonable care and diligence in the construction, equipment, operation, and management of their locomotives. Ordinary and reasonable care and diligence, however, does not require the adoption of every new invention or contrivance which science may or can suggest. They fulfill the measure of their duty in this respect by adopting such improved appliances and contrivances as are in general practical use by well-regulated railroad companies, and which have been proved by experience to be adapted to the purpose. When they have discharged this duty, and the locomotive is properly and prudently managed, they are not liable for accidental injuries caused by the escape of fire from their engines."

It is contended that this charge lacks a predicate in the evidence; that, while the first and second counts charge that the fire was caused by sparks from the engine, no evidence was introduced by the plaintiff to sustain this allegation; that plaintiff's case was based on the third and fourth counts, alleging that the fire was caused by clinkers thrown from the engine. It is also contended that it excludes all evidence of the fire starting in the grass on the defendant's right of way, or whether the defendant had skilled employees operating its engines. It is true as a general rule that instructions should be confined to the issues made by the pleadings and the evidence bearing on these issues. *Savannah, F. & W. Ry. Co. v. Tiedeman*, 39 Fla. 196, 22 South. 658, and cases cited.

A plaintiff has the right to complain of instructions which vary or narrow these issues to his prejudice, and a defendant has a right to complain if they are so varied or broadened as to embrace matters not therein included to his prejudice. In the case at bar, however, the first two counts of the declaration



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averred that the fire was caused by "sparks, fire, and live cinders," which were negligently permitted to escape from the engine. The record does not disclose that the plaintiff ever notified the court or the defendant's attorneys that he abandoned those two counts. The defendant introduced a good deal of testimony tending to rebut the averments of these two counts, without objection on the part of the plaintiff. Even if it were clear that the instruction was not strictly applicable to the plaintiff's testimony, still, under the circumstances, he has no right to complain of it. If he intended to abandon the first two counts, he should have informed the court before the jury was charged.

As to the contention that the instruction excluded consideration of evidence tending to show negligence in the defendant, and especially that fire was communicated to the grass growing on defendant's right of way, we do not think it tenable. The instruction dealt solely with the liability of the defendant as regards the construction, equipment, operation, and management of its locomotives. This instruction is to be considered in connection with all the other charges and instructions. The first instruction given at the request of the plaintiff was as follows: "If you find from the evidence that the agents and servants of the defendant threw from one of the engines of the defendant, on the morning of the fire, certain clinkers, and that said clinkers fell upon the right of way of the defendant and fired the grass growing thereon, and that such fire spread from that place to the grass growing and standing between said right of way and the lumber of the plaintiff, and consumed the same, and, spreading thence, fired and consumed the property of the plaintiff, and that the plaintiff was at the time using ordinary care and caution in the protection of his property which was so consumed, then you will find for the plaintiff in such sum as you shall find from the evidence has proved to have been the value thereof at the time of its destruction by fire." The second instruction given on request of the plaintiff was even stronger in favor of the plaintiff than the foregoing one. Its purport is that the jury should find for the plaintiff if the grass growing on the right of way was fired by clinkers thrown from the engine, and such fire was communicated to the property of the plaintiff, without negligence on the part of the defendant. When these instructions are considered together, there does not appear a possibility that the jury were misled, by the instruction objected to, into ignoring the evidence relating to the communication of fire to the grass growing on the right of way or to the competency of the employees operating the engine.

The eleventh, twelfth, fourteenth, fifteenth, and eighteenth assignments are based on instructions given at the request of the defendant. The objections to these instructions are similar to those considered under the tenth assignment, and it would simply add to the bulk of this opinion to reiterate what we have said. We discover no reversible error under either of them, construed, as they must be, in connection with the other instructions.



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The thirtieth assignment of error is based on the following instruction given at the request of the defendant: "A railroad company is only required to use ordinary care and diligence, such as prudent men skilled in the business would ordinarily use in the particular case in question, to protect property on the line of their road from damage by reason of sparks escaping, or clinkers, from their locomotives. What constitutes negligence upon the part of the company with reference to a fire set out by sparks or clinkers from its engines depends upon the circumstances of each particular case." This instruction is objected to on grounds which we discussed under other assignments, and also because it does not set forth with sufficient definiteness the degree of care required of the defendant in operating its trains at the point where the plaintiff's property was situated, near the railroad track. This instruction is identical in purport with the fourth instruction given at the request of the plaintiff in stating the duty of a railroad company to exercise ordinary care and caution in the operation of its trains so that the property of persons situated near or adjacent to the right of way shall not be damaged or destroyed. The plaintiff has no right to complain of this instruction.

The sixteenth assignment of error is based on the eight instruction requested by the plaintiff, viz.: "The jury are not permitted to infer, or presume, for want of positive proof to the contrary, that the fire was communicated by the operation of the railroad." It is contended that this instruction is argumentative, ignores the affirmative evidence of the plaintiff tending to show the fire was set out by clinkers from the engine of defendant, and comprehends any character of fire which might have been set out by the operation of the railroad, and was misleading. We fail to see the force of these objections. The instruction states what we understand to be law in such a case, viz.: The burden of showing affirmatively in the first instance that the fire was caused by the defendant was on the plaintiff, and that this fact could not be presumed. It ignores no evidence, but simply furnishes a guide to the jury in considering the evidence.

The seventeenth assignment of error is based on the ninth instruction given at the request of the defendant, viz.: "If the jury should be satisfied from the evidence that the fire did originate from sparks emitted, or clinkers, from defendant's engine, they should not be justified in finding a verdict for the plaintiff, if it should also appear from a preponderance of the evidence that the defendant did exercise all ordinary and reasonable care and diligence in the equipment and operation of its engines, and was not otherwise negligent."

The objections to this instruction are, first, that it is postulated upon evidence of sparks emitted from the engine, which is wanting; second, that it is improper, in raising the question as to the equipment of the engines of the defendant, when there is neither allegation nor proof of their defective equipment; third, that it excluded from the jury consideration of any evi-

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dence as to the fires starting in weeds and grass along defendant's right of way; fourth, it advises the jury that reasonable care in equipment and operation are absolute defenses to the action, whereas, they only go to rebut the presumption created by the law and create the necessity of the plaintiff's showing actual negligence. A number of authorities are cited to sustain these contentions, among them *St. Johns & H. R. Co. v. Ransom*, 33 Fla. 406, 14 South. 892. There is no doubt of the correctness of the law laid down in this case. There is no doubt that it is the duty of a railroad company to keep its right of way adjacent to the property of others free from combustible material, and that it is liable for its neglect of such duty when it results in damage to others. The first two grounds of objection have been discussed under assignments on other instructions. As to the third ground of objection, it does not seem to us that it is tenable. The last clause of the instruction expressly informs the jury that it was not meant to exclude from their consideration other negligence of the defendant than that therein specifically referred to, and so the fourth objection fails, because the instruction does not make reasonable care in equipment and operation of the engines absolute defenses to this action. This, it seems to us, becomes perfectly clear when this instruction is construed in connection with the first and second instructions given on behalf of the plaintiff and discussed under the tenth assignment. The facts which existed in the case of *St. Johns & H. R. Co. v. Ransom*, *supra*, which was tried by a referee, are different from those in the case at bar, and both in the declaration and proofs was very much stronger against the railroad company.

The twenty-third and twenty-fourth assignments are based on instructions given at request of the defendant. It is contended that these instructions limited the jury in the assessment of damages, if they found for the plaintiff, to the net market value of the property destroyed, and excluded interest. Inasmuch as the verdict was for the defendant, it is unnecessary to discuss these assignments.

The twenty-fifth assignment is based on the twenty-second instruction given at the request of the defendant, viz.: "The declaration in this case does not allege that the fire destroying the lumber was caused by a fire spreading from burning cross-ties set on fire along the defendant's right of way; and, if you believe, from the evidence, that the origin of the fire destroying the lumber was the burning cross-ties, then you should find for the defendant." The objection to this instruction is that it was without foundation in the evidence and is misleading. There was a good deal said in the testimony about a pile of burning cross-ties in the vicinity of the lumber that was burned. It seems to have been the first impression that the fire which burned the lumber originated from this source. No one saw the fire spread from the railroad track to the lumber pile, and it is not easily to determine positively from the testimony that

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it did so. The blue print map filed in advance by the defendant, without objection on the part of the plaintiff, shows that the burned district did not reach from the burned lumber pile to the right of way fence of the defendant. Some of the witnesses for the plaintiff state that the grass was burned all the way from the railroad track to the lumber pile. One of them (Mr. Stokes) states that the map was all right as to the burned district, he "guessed." Doubtless, in this state of the evidence, this instruction was requested and given, out of the abundance of caution, so as to cause the jury to confine their investigation to the issues made by the pleadings. We discover no reversible error under this assignment.

The twenty-sixth assignment is based on the following instruction given at the request of the defendant, viz.: "The court further instructs the jury that all persons erecting buildings or manufacturing establishments in the immediate vicinity of a railroad track take and assume the risks of fire communicated from passing engines, provided such engines are equipped with the best-known appliances to prevent the escape of fire, and are kept in repair, and are managed with reasonable care and skill." The objections to this instruction, besides those which have been discussed under other assignments, are that the instruction is erroneous, inasmuch as the proximity of the property of the plaintiff to the railroad is not negligence on the part of the plaintiff, but requires greater care by the defendant. The case of Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 33, 65, is referred to as sustaining this contention. The instruction contains an abstract proposition of law, which, as such and so far as it goes, it seems to us, is unobjectionable. Those who establish themselves in the neighborhood of railroads must know that trains are expected to run upon them, and, if there are risks arising from no want of care in the proper equipment and management of engines and trains, those risks are not chargeable to the railroad, but are incidental to the situation. See cases cited in Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Mfg. Co., *supra*; Toledo, Wabash & Western Ry. Co. v. Larmon, 67 Ill. 68, text 70. This instruction was immediately followed by one given by the court of its own motion, viz.: "The degree of care required to be used by a railroad company in the construction, equipment, and operation of its locomotives must be, according to the circumstances or in proportion to the danger, such care as is ordinarily sufficient under similar circumstances to avoid danger and secure safety." The court had previously given the following instruction at the request of the plaintiff, viz.: "The court charges you that the law requires of railroads in the operation of their trains the exercise of ordinary care and caution, so that the property of persons situated near or adjacent to their right of way shall not be damaged or destroyed by reason of the operation of such trains. Where such ordinary care is not exercised, and the injury to

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the property of another is occasioned thereby, the plaintiff is entitled to recover for the value of the injuries sustained." Considered together, these instructions do not mean that the plaintiff was guilty of negligence in placing his property near the railroad, nor do they obviate the necessity of proof of care on the part of the defendant proportionate to the circumstances. The question of what was, under the circumstances, ordinary care was properly left to the jury. 3 Elliott on Railroads, § 1228.

The twenty-eighth assignment is based on the charge given by the court and mentioned above. The objections to it are that it is outside the issues made, that it excludes all evidence of negligence, and that it improperly defines the degree of care which was necessary with regard to clinkers. We think it unnecessary to say more than that, construed in connection with the other instructions and with the issues made by the declaration, it is not erroneous.

The twenty-ninth assignment of error is based on the action of the trial judge in re-reading to the jury, at their own request, the twenty-fifth instruction given at the request of the defendant. It is contended that the jury were unduly impressed by thus giving undue prominence to this instruction, which was itself an erroneous statement of the law. This instruction, as we have already said, states an abstract proposition of law, which, taken in connection with other instructions of a like kind, was not an erroneous presentation of the law. It is true that, where the court instructs the jury upon what state of facts they must find a verdict for a party, the instruction should include all the facts in controversy material to the rights of the plaintiff or the defense of the defendant. 11 Ency. Pl. & Pr. 188. But this rule is not applicable to this instruction, nor to many others given in this case, where the same contention is made. There was no error in the judge's re-reading this instruction to the jury at their request. 11 Ency. Pl. & Pr. 287.

The thirtieth assignment is based on the action of the court in overruling the motion for a new trial. This assignment is submitted without argument, and we shall, therefore, treat it as abandoned. Thomas v. State, 36 Fla. 109, 18 South. 331; Charles v. State, 36 Fla. 691, 18 South. 369, and cases cited.

In conclusion, we feel constrained to express our disapproval of the practice, which we think is illustrated by the defendant's attorneys in this case, and which is becoming common in Florida, viz., that of requesting an unnecessarily large number of instructions to the jury. Besides the risk of error thereby created, for it is almost impossible for a trial judge to give a critical examination to a multitude of instructions, they are calculated to mislead and confuse a jury, and impose upon a reviewing court an unnecessary burden. It is either obliged to spin out its opinions to a wearisome length, or abbreviate in

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such a manner as to be subject to the criticism of having overlooked the issues. 11 Ency. Pl. & Pr. 150.

The judgment of the lower court is affirmed.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

**ASHLEY v. KANAWHA VALLEY TRACTION CO.**

(Supreme Court of Appeals of West Virginia, Oct. 23, 1906. Rehearing Denied Jan. 10, 1907.)

[55 S. E. Rep. 1016.]

**Street Railroads—Use of Streets—Superior Rights.\***—A street railroad company has an equal right with the public to the use of streets at street crossings. Neither has a superior right to the other.

**Same—Negligence—Excessive Speed.†**—It is negligence for a street car company to operate its cars at such a rate of speed as not to have them under control and to be able to stop them readily as they approach intersecting streets, in case it may be necessary, to avoid a collision or prevent an accident.

**Same—Signals.**—A street car company should give proper warning of the approach of its cars at street crossings. For a failure to do so it will be guilty of negligence.

**Same—Street Intersections—Due Diligence.†**—More care is required in operating street cars at street intersections than at other points, and, if a street car company at such intersections runs its cars at an excessive and unusual rate of speed, it will be guilty of negligence.

**Same—Contributory Negligence.**—It is not contributory negligence for one to attempt to cross a street railway track in front of an approaching car, if, in doing so, he exercises that judgment and care which a reasonably prudent and careful person would have exercised under like circumstances.

**Same—Regulation of Speed—Ordinances.‡**—A municipal corporation may, within reasonable limits, regulate and prescribe the speed

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\*For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see foot-notes appended to *Palmer Transfer Co. v. Paducah Ry. & L. Co.* (Ky.), 21 R. R. R. 815, 44 Am. & Eng. R. Cas., N. S., 815; foot-notes appended to *Halloran v. Worcester Consol. St. Ry. Co.* (Mass.), 20 R. R. R. 583, 43 Am. & Eng. R. Cas., N. S., 583.

†For the authorities in this series on the subject of the care required of those in charge of street cars in regulating the speed of cars in order to avoid collisions with other users of streets, see foot-note appended to *Beier v. St. Louis Transit Co.* (Mo.), 22 R. R. R. 281, 45 Am. & Eng. R. Cas., N. S., 281.

‡For the authorities in this series on the subject of the power of municipalities to regulate the operations of street railways, see foot-

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at which street cars may be operated over its streets, and, when it has done so by valid ordinance, it will be negligence per se for a street car company to run its cars at a speed exceeding that fixed by the ordinance.

**Same—Fenders.†**—Where, by valid municipal ordinance, street cars are required to be equipped with fenders of an approved make, it is negligence per se to operate such cars without such equipment.

(Syllabus by the Court.)

Error to Circuit Court, Kanawha County.

Action by Allie E. Ashley, administratrix, against the Kanawha Valley Traction Company. Judgment for defendant, and plaintiff brings error. Reversed.

*Littlepage, Cato & Bledsoe, John Baker White, and Clarence Burdette*, for plaintiff in error.

*Chilton, MacCorkle & Chilton and T. R. English, Jr.*, for defendant in error.

SANDERS, J. This writ of error is to a judgment of the circuit court of Kanawha county, rendered in an action brought by Allie E. Ashley, administratrix of John J. Ashley, deceased, against the Kanawha Valley Traction Company, to recover damages for an alleged wrongful and negligent killing of said John J. Ashley by the defendant company. The circuit court excluded all the plaintiff's evidence, directed a verdict for the defendant, and entered judgment dismissing the action. The question to be determined in reviewing the judgment of the circuit court is whether or not the defendant is chargeable with such negligence as directly caused the injury from which Ashley died, and, if so, was Ashley guilty of such contributory negligence as would bar plaintiff's right to recover?

On the 6th day of October, 1902, the defendant was the owner and operator of a street railroad in the city of Charleston, and on that day the deceased was standing at the southeast corner of Virginia and Court street, in said city, engaged in conversation with one George Warner. At this time a car of the defendant company was going east on Virginia street, in the direction of Ashley, and when it had reached a point some distance

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notes appended to *McHugh v. St. Louis Transit Co. (Mo.)*, 17 R. R. R. 349, 40 Am. & Eng. R. Cas., N. S., 349; foot-notes appended to *Sluder v. St. Louis Transit Co. (Mo.)*, 16 R. R. R. 293, 39 Am. & Eng. R. Cas., N. S., 293.

For the authorities in this series on the question whether the violation of an ordinance limiting the speed of trains or street cars is negligence, see foot-notes appended to *Eckhard v. St. Louis Transit Co. (Mo.)*, 21 R. R. R. 831, 44 Am. & Eng. R. Cas., N. S., 831; foot-notes appended to *Schmidt v. Missouri Pac. Ry. Co. (Mo.)*, 21 R. R. R. 806, 44 Am. & Eng. R. Cas., N. S., 806; foot-notes appended to *Bresee v. Los Angeles Traction Co. (Cal.)*, 20 R. R. R. 537, 43 Am. & Eng. R. Cas., N. S., 537; foot-notes appended to *Kansas City, etc., R. Co. v. Williford (Tenn.)*, 19 R. R. R. 549, 42 Am. & Eng. R. Cas., N. S., 549.

†See foot-note on preceding page.



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from where he was standing he mounted his bicycle and started across the street in front of the approaching car. When nearly across the car track the rear wheel of his bicycle seemed to hang momentarily upon the rail farthest from where he started, and while in this position the car struck the rear wheel of the bicycle, and as a result the rider was thrown against the curbstone, and received injuries from which he died shortly afterwards. The place of the accident is where Virginia and Court streets cross, and Ashley was traveling in a northerly direction on Court street, crossing Virginia street, over which the defendant's car track ran. It is not clear from the record just where the car was at the time Ashley mounted his bicycle and started across the track, but we think it can be safely said that it was at least 200 feet west of the point where the accident occurred. The car was running at a high rate of speed—estimated by the witnesses to have been from 15 to 30 miles an hour—one witness estimating it from 15 to 17 miles, another from 25 to 30 miles, and two other witnesses from 18 to 25 miles—the lowest estimate being 15 miles and the highest 30 miles an hour. The speed of the car was not slackened until after it struck the bicycle, after which it ran about 90 feet before it was stopped. One of the witnesses stated in reply to an inquiry as to whether or not, from the time he first saw the car until it struck Ashley, there was any slackening of speed: "I didn't see any. Of course the street car was running so fast that it could not be slackened up right there. I don't think it could be. I didn't see it slacken none." Another witness stated that the car was running unusually fast at this time, and also stated that at this point the cars usually ran about 10 or 12 miles an hour. The gong was not sounded, and no alarm whatsoever was given until the car was within about 30 feet of Ashley, and this was after it had passed the western line of Court street. At the time Ashley was attempting to cross Virginia street there was also a wagon crossing it, which was between him and the street car. The wagon crossed the street car track and had gone beyond it about 10 or 15 feet when the car reached the point at which it had crossed. It also appears at the time of the accident there was an ordinance of the city of Charleston in force, limiting the speed of street cars within the city limits and within the business portion of the city to 8 miles, and in the suburban districts to 15 miles, an hour. There was also another ordinance of said city, making it unlawful for cars to be run or operated therein without fenders of the most approved make. The car in use at the time of the injury here complained of was not equipped with a fender of any character whatsoever.

In dealing with the questions presented, we will first do so independently of the ordinance of the city limiting the speed of cars and requiring them to be equipped with fenders. The place where the accident occurred being a street crossing, we approach a solution of the questions involved with the understanding that at this point the rights of the parties were equal. A street rail-

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way company operating its cars over the streets of a town or city has at street crossings no higher or paramount right of way to that of pedestrians or other users of such streets, but its right to the use of streets at street crossings, where the car tracks cross other streets than the one they run along, is precisely the same as that of pedestrians or vehicles crossing its tracks there. Neither has a superior right to the other. The right of each must be exercised in a reasonable and careful manner, having due regard for the rights of others, and so as not to unreasonably obstruct or interfere with the right of passage or proper use of the streets. The car has the right to cross, and must cross, the street, and the pedestrian or traveler has the right to cross, and must cross, the railroad track. The rule is somewhat different at points other than street intersections, or crossings, but as this accident occurred at a crossing, it is not necessary to refer to, or point out, such difference. *Bass' Adm'r v. Norfolk Ry. & Light Co.*, 100 Va. 1, 40 S. E. 100; *Richmond, etc., Ry. Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839; *Solomon v. Buffalo Ry. Co.* (Sup.) 89 N. Y. Supp. 99; *Thompson on Negligence*, § 1399; *Nellis, Street Railways*, § 14. The care required to be used by the defendant at street intersections must be such as is commensurate with the increased dangers arising from the travel at such crossing. The defendant, operating dangerous machinery over the streets of a city, must know, and is bound in law to know, that others have an equal right to the use of the streets and may be upon them. Where a pedestrian or traveler is approaching a street crossing towards which a car is approaching, the duty to stop and avoid a collision is on the party who can most easily and readily adjust himself to the exigencies of the case; and as to whether or not the defendant used that degree of care chargeable to it depends upon all the facts and circumstances. There can be no rule of general application defining the degree of care required to be used by a street railway company in operating its cars over the public streets of a city, or fixing the rate at which such cars should be run, because of the varied facts and circumstances applicable to each particular case; and in every instance the true inquiry is, was the cars, at the time of the injury, being operated in a prudent and careful manner, taking into consideration the place of its operation, the various uses of the street, and the amount and kind of usual travel, and the other facts and circumstances surrounding the case? More care is required to be exercised at street intersections than at any other points, because the company may expect pedestrians or other users of the streets to be constantly crossing its track, as they have the lawful right to do, and, therefore, the car should approach the crossing in a careful and cautious manner, so as to avoid injury to others who are using the streets in a proper and careful way. In the case of *Richmond, etc., Ry. Co. v. Gathright*, *supra*, it was held that it was gross negligence in a street railway company to so overcrowd and load down its cars with passengers beyond any

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reasonable or proper limit as not to be able to stop them readily as they approach intersecting streets in case it may be necessary to avoid a collision or prevent an accident. It was the duty of the defendant to have given notice or warning upon approaching the crossing, and not only this, but, as it neared the crossing, to run at such a rate of speed as to have the car under control and be able to stop it readily. *Bass' Adm'r v. Norfolk Ry. Co., supra.*

When we apply these principles to the plaintiff's evidence, we can but come to the conclusion that the case should have been submitted to the jury for their determination as to whether or not the defendant was guilty of negligence. The defendant, at the street crossing where the accident occurred, in the business part of a populous city, was running its cars at from 15 to 30 miles an hour, as estimated by the witnesses—none of them making it less than 15 miles, and none fixing it at a higher rate than 30 miles. It is true, there is some controversy as to whether this point is in the business portion of the city, but it must be remembered that this is a motion to exclude evidence, and we must say upon this motion that this is so, because the jury, under the evidence, could have found this fact. While so operating the car, the motorman could see that a wagon was crossing the car track at the crossing where the accident occurred, between the point where Ashley was injured and the car, and also while the car was about 200 feet from the crossing he could see that Ashley was attempting to cross the track. Notwithstanding this, the speed of the car was not slackened, and no effort was made to check its speed, nor was any care whatsoever used to avoid a collision with the wagon or the deceased. Not only did the motorman continue to run the car at this high rate of speed up to the point where the streets intersect, but it was continued at the same rate of speed across Court street until the wheels of Ashley's bicycle was struck, notwithstanding the fact that he was in plain view of motorman at the time he started across the track, and so continued until the car struck his wheel. No effort was made to stop the car until it struck the wheel, and then it could not be stopped until it had gone about 90 feet beyond the point at which the accident occurred. No notice or alarm was given, and the gong was not sounded, taking the most favorable view of it for the defendant, until the car was within 30 feet of Ashley, and after it had passed the western line of Court street. These facts the jury could have found, and this being so, the case should have been submitted to them. They should have been permitted to pass upon the evidence, and by their verdict say whether or not these facts were established. Although the jury could have found from the evidence that the car was not operated in a careful and prudent manner, yet before the plaintiff could recover the negligence of the defendant must have been the proximate cause of the injury. The company may have been negligent, yet, at the same time, if the injury was the result of an inevitable

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accident, it could no more be held liable than it could if it were free from negligence and operated its car in a careful and prudent manner, and, therefore, we will inquire, was this injury the direct result of the defendant's negligence, or was it the result of an inevitable accident? The rear wheel of the bicycle hung momentarily upon the rail of the car track. Was this such an event as could have been expected by the company in operating its car in a prudent and careful manner? In other words, would a prudent and careful person, in operating the car in a prudent and careful manner, have foreseen or anticipated the happening of such an event? If not, then the accident must fall within the inevitable class. This should have been submitted to the jury. The evidence is such as called for its submission to them. for their decision. A bicycle is a vehicle. It may be lawfully ridden upon a street or highway, and has the same rights upon the highway as other vehicles, and it is the duty of a street railway company to give to a bicyclist who is riding on, or attempting to cross, its track in front of its car the usual and sufficient warning, and to exercise the same degree of care as is required in favor of other vehicles. Here the rear wheel of the bicycle only hung momentarily upon the rail, and as to whether or not this could have been anticipated should have been left to the jury. But it is urged that the plaintiff's right to recover is barred by the contributory negligence of the deceased. Of what does this negligence consist? The car, at the time Ashley started from the corner of the street where he was in conversation with Warner, was about 200 feet west of the point where the accident occurred, and the distance that he had to travel in order to pass over the track was about 25 feet. Then the question arises, would a reasonably prudent person, under the existing circumstances, have attempted to cross the track? If so, we cannot say that Ashley was guilty of negligence. Defendant's counsel contend that Ashley, seeing the car, and knowing that it was coming in his direction, voluntarily mounted his bicycle and attempted to cross the track in front of it. This is true, but it certainly cannot be said that, because a person can see a car 200 feet away, coming in the direction of the point where he expects to cross the track, he has to stand and wait until the car has passed. In a populous, active business city it would be an anomaly to hold that every traveler, in endeavoring to cross a street car track, must look and listen for a car, and, if he can hear or see one distantly approaching, he must wait until the car has passed before attempting to cross the track. This is certainly not required. Ashley had the right to judge as to whether or not he had sufficient time within which to cross the track in front of the approaching car, and it was for the jury to say whether or not he exercised such judgment as a reasonably prudent person would have exercised under like circumstances. He had the right to assume that the street car company was running its car at a lawful rate of speed, that it would approach the street crossing in a lawful manner, that it would have due regard for his

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rights, and that, when it saw him upon its track, it would so operate its car as to avoid, if possible, injuring him. The question as to whether or not the decedent was guilty of contributory negligence was a question for the jury, and the testimony bearing upon this feature of the case should have been submitted to them. *Richmond Passenger & Power Co. v. Gordon* (Va.) 46 S. E. 772; *Indianapolis Street Railway Co. v. Schmidt* (Ind. App.) 71 N. E. 663; *Moore v. Metropolitan Street Ry. Co.* (Sup.) 82 N. Y. Supp. 778; *Dallas, etc., Ry. Co. v. Illo* (Tex. Civ. App.) 73 S. W. 1076; *Bertsch v. Metropolitan Street Ry. Co.*, 68 App. Div. 228, 74 N. Y. Supp. 238; *McDermott v. Blooklyn Heights R. Co.* (Sup.) 85 N. Y. Supp. 807; *Cass v. Third Ave. R. Co.*, 20 App. Div. 591, 47 N. Y. Supp. 356; *Hanheide v. St. Louis Transit Co.* (Mo. App.) 78 S. W. 820; *Meng v. St. Louis, etc., Ry. Co.* (Mo. Sup.) 81 S. W. 907.

The plaintiff offers another reason why the court erred in excluding the evidence and directing a verdict for the defendant, and that is that, at the time of the injury complained of, there was an ordinance of the city of Charleston in force, limiting the speed of street cars in the business portion of the city to 8 miles an hour, and in the suburban district to 15 miles and hour, and that, it having been shown that the place at which the accident occurred was within the business portion of the city, and that the car was being operated at not less than 15 miles an hour, the company is then guilty of negligence *per se*. A municipal corporation, for the protection of life and property, has the unquestionable right, under its police power, to adopt ordinances limiting and regulating the speed of street cars operated upon its streets. This being within the constitutional power of such corporation, a violation of such ordinance, if it be the direct and proximate cause of the injury, is negligence *per se*. "Here the general conception of the courts, and the only one that is reconcilable with reason, is that the failure to do the act commanded, or the doing of the act prohibited, is negligence as mere matter of law, otherwise called negligence *per se*, and this, irrespective of all questions of the exercise of prudence, diligence, care, or skill, so that, if it is the proximate cause of hurt or damage to another, and if that other is without contributory fault, the case is decided in his favor, and all that remains to be done is to assess his damages." *Thompson on Negligence*, § 10.

The courts are at variance as to whether or not a violation of the ordinance which is the direct and proximate cause of the injury is negligence *per se*, or whether it is simply evidence of negligence to be submitted to the jury. The great weight of authority seems to hold that it is negligence *per se*, and this, in reason, seems to be the better rule. *Deitring v. St. Louis Transit Co.* (Mo. App.) 85 S. W. 140; *Kolb v. Same* (Mo. App.) 76 S. W. 1050; *Meyers v. Same* (Mo. App.) 73 S. W. 379; *Jackson v. Kansas City, etc., R. Co.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; *Central of Ga. Ry. Co. v. Bond* (Ga.) 36 S. E. 299; *Tobey v. Burlington, etc., R. Co.*, 94 Iowa. 256, 62



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N. W. 761, 33 L. R. A. 496; St. Louis, etc., R. Co. v. Huggins, 20 Ill. App. 639; Omaha St. Ry. Co. v. Duvall, 40 Neb. 29, 58 N. W. 531; Riley v. Salt Lake Rapid Transit Co., 10 Utah, 428, 37 Pac. 681. "It is to be regretted that two or three authoritative courts have fallen into the aberration of holding that the violation of a statute or municipal ordinance, enacted for the public safety, does not establish negligence *per se*, but is merely what the books term 'evidence of negligence'; that is to say, competent, but not conclusive, evidence to be submitted to the jury on the question of negligence or no negligence. It seems to have escaped the attention of the judges who laid down this rule that it has the effect of clothing common juries with the dispensing power." Thompson on Negligence, § 11. Was the violation of the ordinance the proximate cause of the injury? The plaintiff's intestate is presumed to have known of the existence of the ordinance, and had the right to believe that the car was being operated at a speed not exceeding eight miles an hour. The car approaching him, it was impossible for him to judge accurately as to what speed it was traveling, but the motorman knew that the speed should be limited to eight miles an hour, and he knew that he was traveling at a much greater rate of speed than that prescribed by the ordinance. If the provisions of the ordinance had been complied with, the deceased would have had time to have passed over the track without injury. This the jury could have found from the evidence, and, if this be true, then they could have found that the violation of the ordinance was the direct and proximate cause of the injury.

And, again, it is advanced that another ordinance of the city of Charleston was in force, requiring the cars of street railway companies to be equipped with fenders of the most approved make, and that, if the car which struck the bicycle of the deceased had been equipped with such fender, the injury would not have occurred. What has been said as to the power of a municipal corporation in adopting the speed limit ordinance can also be applied to the adoption of the ordinance now under discussion. The adoption of the ordinance is clearly within the constitutional power of a municipal corporation. This ordinance is also shown to have been violated. But it will not do to show only the violation of the ordinance. It must be shown that such violation is the proximate cause of the injury—that, if the car had been equipped with fenders as provided by the ordinance, the injury would not have occurred. This is proper to be shown to the jury. It is, however, urged by the defendant that the evidence shows that there are two kinds of fenders of an approved make, one projecting out in front of the car and the other hanging underneath the front part of the car, and that, this being so, the company would have the right to elect which of the two kinds of fenders it would use, and that, if it should use the last mentioned, the injury would have occurred the same as if no fender had been used. These are questions



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of fact to be submitted to the jury. If it can be shown that the accident would not have occurred if the car had been equipped with such fender as the ordinance prescribed, and that the car was not equipped with such fender, then this would be negligence sufficient to charge the company. But, upon the other hand, if it could be shown that the accident would have happened if the car had been equipped with such fender, the same as it did when not so equipped, then the omission to provide such fender would not be the proximate cause of the injury, and the company could not be held liable for failing to so provide them. Evidence tending to show either of these theories is admissible. *Henderson v. Durham Traction Co.* (N. C.) 44 S. E. 598.

The evidence of Joseph Moss as to the rate of speed at which the car was running, is admissible, under the authority of *McVey v. Chesapeake & Ohio Ry. Co.*, 46 W. Va. 111, 32 S. E. 1012: "The speed of a passing train is not a question of science, but of observation, and any one possessing knowledge of time and distance is competent to testify in relation thereto"—and citing *Railroad Co. v. Van Steinburg*, 17 Mich. 99.

The defendant says that the judgment could be sustained because the plaintiff failed to prove that Allie E. Ashley was duly appointed the administratrix of the estate of John J. Ashley. She sues as such administratrix, and under the pleadings she was not called upon to prove it. A plea to the merits admits it. This is not an open question. In the recent case of *Hanley v. W. Va. Cent. & Pittsburgh Ry. Co.* (W. Va.) 53 S. E. 625, it is so held, and also the same is held in *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033. But, were this not so, still the record shows that the defendant admitted that the plaintiff was the duly and regularly appointed administratrix of the deceased.

The judgment is reversed.

FORD'S ADM'R *v.* PADUCAH CITY RY.

(Court of Appeals of Kentucky, Jan. 30, 1907.)

[99 S. W. Rep. 355.]

**Evidence—Expert Testimony—Street Railroads—Injuries to Persons on Track.\***—In an action for the death of one struck by a street car, plaintiff could not show by expert testimony what would be a reasonably safe rate of speed for a car to be operated over such a street as the one in which the accident occurred, it being for the jury to determine from the evidence whether the car was traveling at a dangerous rate of speed or not.

**Street Railroads—Violation of Speed Ordinance.†**—In an action for the death of one struck by a street car, that at the time of the accident the company was violating an ordinance limiting the speed of cars was no evidence of negligence toward decedent.

**Same—Misleading Instructions.**—In an action for the death of one struck by a street car, an instruction that the company had a right to use its track was not objectionable as tending to lead the jury to believe that the company's right was exclusive.

**Same—Right of Way over Tracks.†**—Though street railway companies have no exclusive right to the use of their tracks, they have the right of way, and it is the duty of persons, whether on foot or in vehicles, to give unobstructed passage to the cars.

**Same—Care Required Towards Persons Walking on Track.†**—Where decedent was walking along the edge of a street car track, the motorman of a car moving towards him had a right to believe that, upon hearing the bell, he would leave the track in time to avoid being struck by the car, and was not required to stop the car or to take steps to avoid injuring him until it became reasonably apparent that he was not going to get out of the way.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by N. M. Ford's administrator against the Paducah City Railway. From a judgment for defendant, plaintiff appeals. Affirmed.

*J. M. Worton*, for appellant.

*Wheeler, Hughes & Berry*, for appellee.

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\*For the authorities in this series on the subject of the admissibility of expert and opinion evidence, see foot-notes appended to *Withey v. Pere Marquette R. Co.* (Mich.), 21 R. R. R. 740, 44 Am. & Eng. R. Cas., N. S., 740; foot-notes appended to *Tiffin v. St. Louis, etc., Ry. Co.* (Ark.), 21 R. R. R. 113, 44 Am. & Eng. R. Cas., N. S., 113; *Elgin, etc., Traction Co. v. Wilson* (Ill.), 20 R. R. R. 37, 43 Am. & Eng. R. Cas., N. S., 37; foot-notes appended to *Sanitary Dist. v. Pittsburg, etc., Ry. Co.* (Ill.), 20 R. R. R. 145, 43 Am. & Eng. R. Cas., N. S., 145.

†See preceding case, and foot-notes.

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LASSING, J. This suit was instituted in the McCracken circuit court by the administrator of N. M. Ford against the Paducah City Railroad, seeking to recover damages for the killing of N. M. Ford. The petition alleges that the defendant company, in operating one of its cars, carelessly, negligently, and recklessly ran upon and against the deceased, knocked him down, and so injured him that he immediately thereafter died. The company's answer was a traverse, and also a plea of contributory negligence. A reply made up the issue. After the issue had been made, the plaintiff offered to file an amended petition, for the purpose of filing the franchise which the defendant company had from the city of Paducah. The defendant objected to the filing of this amendment, and the court sustained the objection, and refused to permit it to be filed. The trial resulted in a verdict for the defendant company, and the plaintiff appeals.

The proof shows that the deceased, an aged man, was walking north, near one of appellee's car tracks on Sixth street in the city of Paducah, between Jackson and Tennessee streets, and that, while so walking, he was struck by a southbound car on said track; that is, a car running in the opposite direction. Sixth street, where the accident occurred, had no improved sidewalks: the sidewalks were laid out, but had not been paved. It was the custom of pedestrians to walk in the streets. The street at this point where the accident occurred had been recently graveled or macadamized, and was rough; the smoothest part was near the tracks, or between the rails of the track, of the defendant company. The deceased was very deaf. The accident was seen by but one eyewitness, a man named Dickey, who was sitting on his porch nearly opposite the place where the accident occurred. He states that when he first observed the deceased he was walking slowly along the street near the outer edge of—perhaps five feet from—the rail of the track; that he was gradually approaching the track. He was so situated on his porch that he could not see the car at the time. His attention was next directed by the ringing of the bell and the holloing of the motorman, and he looked up and saw the deceased almost opposite him, and too near the car track to permit the car to pass without striking him, the car at the time being some 60 or 80 feet from the deceased. The car did not run over deceased, but struck and knocked him down, and he died in about 15 minutes thereafter. The car came to a standstill before it had entirely passed deceased. The witness Sencer testifies that deceased was lying with his feet near the hind trucks of the car. The motorman in charge of the car did not testify, the proof showing that he was not, at the date of the trial, in the employ of the company, and had not been for a month or more, and his whereabouts were unknown. A witness (Rice), flagman for the Nashville, Chattanooga & St. Louis Railway Company, testifies that he heard the car strike deceased when he was a square and a half away; that he heard the lick

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above the sounding of the bell and the holloing of the motor-man; in fact, he says he is not positive he heard either the ringing of the bell or the holloing of the motorman, but it was the lick that attracted his attention. Appellant offered to prove by several witnesses who had had experience in the operation of street cars what would be a safe and reasonable speed in running cars, but the court refused to permit this testimony to go to the jury. These facts are taken from the statement thereof in appellant's brief.

Appellant claims that the trial court erred to his prejudice in several particulars, but principally in refusing to permit him to show by expert street car operators what would be a safe and reasonable rate of speed for a car while being operated over a street such as the one that this car was being operated on at the point where the injury occurred; second, that the court erred in instructing the jury; and, third, that the court erred in refusing to permit the amendment offering to file the franchise of the defendant company to be filed. We do not think that the court erred in refusing to permit the witness to testify as to what would be a reasonable rate of speed, for the reason that what might be negligence in the speed of a car in one portion of a city might not be negligence in another portion thereof; in fact, what would be negligence in the speed of a car in one square of a street, might not be negligence in the next square. So it is impossible to fix an arbitrary rate of speed at which it would be safe to operate a car within the city limits. Appellant was permitted to prove, as best he could, the speed at which the car which ran against deceased was moving; he was permitted to show the condition of the street, the extent to which it was used by the public, and the purposes for which it was used in general by the public, and we are of the opinion that, with these facts before then, it was for the jury to say whether the car in question was traveling at a dangerous rate of speed. It has been held that to move a car at all is *per se* dangerous. *L. & N. R. R. Co. v. McCombs*, 54 S. W. 179, 21 Ky. Law Rep. 1232. The danger is not confined alone to the speed with which the car is moved, but to the manner in which it is operated as well, and, when the jury is told how fast the particular car in question was moving, the condition of the track over which it was moving, and the use to which the street was put over which it was moving, they must judge for themselves as to whether or not the rate of speed, under the circumstances and conditions shown to exist, was excessive.

Counsel for appellant contends with much earnestness that the court erred to his prejudice in refusing to allow proof that the ordinance of the city of Paducah requires street cars to move in the business sections of the city at a rate of speed not exceeding 8 miles an hour, and elsewhere at a rate not exceeding 10 miles per hour, and he cites authorities from several other states tending to support his contention. He does not cite any

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Kentucky authorities, however, and we have been unable to find any that tend to support his contention. On the contrary, it has been repeatedly held that the violation of a city ordinance in this respect is, of itself, no evidence of negligence. *L. & N. R. R. Co. v. Redmon's Adm'x*, 91 S. W. 722, 28 Ky. Law Rep. 1293; *L. & N. R. R. Co. v. Dalton*, 43 S. W. 431, 19 Ky. Law Rep. 1318; *Dolfinger v. Fishback*, 12 Bush, 474. The violation of a city ordinance is no more evidence of negligence than obedience to its provisions would be evidence of due care. We do not think the trial court erred in refusing to permit the ordinance to be introduced.

Appellant complains of the instructions as given by the court, but a careful analysis of his objections thereto shows that his real objection is because the court said to the jury in instruction No. 1. that appellee had a right to use its track, and he argues from this fact that the jury were doubtless led to believe that appellee had the exclusive right to the use of its tracks. We do not think, however, that the jury was misled by this instruction. The Supreme Court of Pennsylvania, in the case of *Ehrisman v. East Harrisburg City Railway*, 24 Atl. 595, 17 L. R. A. 448, said: "There is this distinction to be observed between steam railroads and street railways. In the case of the former they have the exclusive right to the use of their tracks at all times and for all purposes, except at road-crossings. Street railways have not this exclusive right. Their tracks are used in common by their cars and the traveling public. While this common use is conceded and is unavoidable in towns and cities, the railway companies and the public have no equal rights. Those of the railway companies are superior. Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: First, from the fact that the car cannot turn out or leave its track; and, secondly, for the convenience and accommodation of the public. These companies have been chartered for the reason, in part at least, that they are a public accommodation. The convenience of an individual who seeks to cross one of the tracks must give way to the convenience of the public. It would be unreasonable that a carload of passengers should be delayed by the unnecessary obstruction of the track by a passing vehicle." And this court in the case of *Central Passenger Railway Co. v. Chatterson*, 14 Ky. Law Rep. 663, adopted the rule laid down in the Pennsylvania case, without qualification, as the law defining the relative rights of the street car companies and citizens in the use of the public streets. Under this rule, the street car had the right of way, and the appellant was not prejudiced because of the fact that the court, in its instruction so told the jury, and when the instruction complained of is read in conjunction with the other instructions given, we are of opinion that appellant was not prejudiced thereby.

Appellant also complains of instruction No. 3, because in

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that instruction the court told the jury that appellee had the right to assume that deceased would leave its track in time to avoid injury, etc. This objection is not well taken, for this court has repeatedly held to the contrary, and in the case of *Ward's Adm'r v. I. C. R. Co.*, 56 S. W. 807, 22 Ky. Law Rep. 191, the rule is thus stated: "The rule is well settled in this state that those in charge of a railroad train on seeing a trespasser on the track have a right to assume that he will get out of the way, and need take no steps to stop the train to avoid injury to him, unless they have reason to believe that he is not aware of the danger, or unable to protect himself." In the case at bar, the proof shows that the deceased was walking north, along the edge of the car track, while the street car was approaching him, going south. There is no evidence that the motorman in charge of the car knew that the deceased was deaf. In the absence of such knowledge he had a right to believe that the deceased would leave the track in time to avoid being struck by the car, upon hearing the ringing of the bell, and the motorman was not required to stop the car or to take steps to avoid injuring deceased until he discovered, or it became reasonably apparent to him, that deceased was not going to get out of the way. After having made this discovery, it was his duty to use all means in his power to avoid injuring him. The witness Dickey testifies that the motorman not only sounded the bell, but that he holloed a warning to the deceased, and evidently made every effort that he could to avoid injuring him. The speed of the car at the time it struck deceased can best be determined from the fact that the car did not pass beyond deceased's body on the ground before it came to a complete stop. The proof is not at all satisfactory as to the rate of speed at which it was traveling, but it was certainly not traveling at a high rate of speed, or else it could not have been stopped within the short space within which it was stopped.

We are of opinion that the court gave to the jury the law of the case as warranted by the facts proven, and the judgment is affirmed.



**BARTO *et ux.* v. BEAVER VALLEY TRACTION CO.**

(Supreme Court of Pennsylvania, Jan. 7, 1907.)

[65 Atl. Rep. 792.]

**Street Railroads—Rights of Public on Track.\***—The right of the public to use the track of a street railway company is subordinate only to the right of the company to have a clear track.

**Same—Collision with Traveler.**—In an action by husband and wife against a street railway company to recover for personal injuries by collision with a street car while they were riding at night in a buggy, the question of defendant's negligence was for the jury.

Appeal from Court of Common Pleas, Beaver County.

Action by J. A. Barto and A. I. Barto against the Beaver Valley Traction Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

*Alfred P. Marshall*, for appellants.

*James L. Hogan* and *John M. Buchanan*, for appellee.

FELL, J. The defendant has a single-track electric railway on one of the streets of the borough of Monaca, on which one car is run every 15 minutes. The track is at the middle of the street, and there is room on either side for vehicles. The space between the rails is paved. The rest of the street is an ordinary dirt road. The plaintiffs at night were riding in a buggy at a show trot on the track. The top of the buggy was down, and they had looked back several times to see whether a car was coming. They first observed the car when it was a rod from them, and the buggy was struck before they succeeded in getting it clear of the track. The car was running 15 miles an hour without a headlight, and no signal of its approach was given. Under this state of facts, detailed by the plaintiffs and their witnesses, a verdict was directed for the defendant on the ground of the plaintiffs' contributory negligence in driving on the track at night when there was room to drive on other parts of the street.

The conclusion reached by the learned trial judge was based on the decisions of this court in *Gilmartin v. Rapid Transit Co.*, 186 Pa. 193, 40 Atl. 322, and *Penman v. Railway Co.*, 201 Pa. 247, 50 Atl. 973. In both of those cases the plaintiffs were pedestrians, and the ground of both decisions is that by walking along on the track of the railway company they voluntarily exposed themselves to a known danger and were negligent in so

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\*For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see second preceding case, and foot-notes.

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doing. The track of a street railway company is not intended for use by pedestrians, but it is open for use by those riding in vehicles. The space between the rails in cities and boroughs is paved for that purpose, and the traveling public are at liberty to drive on it. Their right to use this part of the street is subordinate only to the right of the company to have a clear track. They are expected to use it, both from necessity at times and for convenience when it offers a better passageway. One using it for convenience, as was the case here, cannot be charged with negligence simply because of the fact that he could have driven at the sides of the street. Whether, under the circumstances, the plaintiffs exercised proper care, was for the jury.

The judgment is reversed, with a *venire facias de novo*.

## FITZGERALD v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 27, 1907.)

[80 N. E. Rep. 224.]

**Street Railroads—Injury to Persons Crossing Track—Contributory Negligence.\***—A verdict was properly directed for a street railroad company, where plaintiff sued for injuries received by being struck by a car while crossing the track to board a car going in the opposite direction, where he could have seen the approaching car, had he looked.

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\*For the authorities in this series on the question whether there may be a recovery for injuries sustained in an attempt to cross street railway tracks by being struck by a car which could have been seen by the injured person before he made such attempt, see foot-notes appended to *Cranch v. Brooklyn Heights R. Co.* (N. Y.), 21 R. R. R. 610, 44 Am. & Eng. R. Cas., N. S., 610; *Kannenbergh v. Conestoga Traction Co.* (Pa.), 21 R. R. R. 80, 44 Am. & Eng. R. Cas., N. S., 80; *Colomb v. Portland & B. St. Ry.* (Me.), 20 R. R. R. 293, 43 Am. & Eng. R. Cas., N. S., 293; *Coats v. Seattle Electric Co.* (Wash.), 17 R. R. R. 165, 40 Am. & Eng. R. Cas., N. S., 165; *Birmingham Ry., etc., Co. v. Oldham* (Ala.), 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165; *Hornstein v. Rhode Island Co.* (R. I.), 14 R. R. R. 401, 37 Am. & Eng. R. Cas., N. S., 401; *Roelfeldt v. St. Louis & S. Ry. Co.* (Mo.), 13 R. R. R. 470, 36 Am. & Eng. R. Cas., N. S., 470; *Mease v. United Traction Co.* (Pa.), 12 R. R. R. 272, 35 Am. & Eng. R. Cas., N. S., 272; *Sullivan v. Boston Elevated Ry. Co.* (Mass.), 11 R. R. R. 512, 34 Am. & Eng. R. Cas., N. S., 512; *Hanlon v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 9 R. R. R. 388, 32 Am. & Eng. R. Cas., N. S., 388; *Gleason v. Worcester Consol. St. Ry. Co.* (Mass.), 8 R. R. R. 759, 31 Am. & Eng. R. Cas., N. S., 759; *McNab v. United Rys. & Elec. Co.* (Md.), 2 R. R. R. 39, 25 Am. & Eng. R. Cas., N. S., 39; *Citizens' St. R. Co. v. Hamer* (Ind. App.), 2 R. R. R. 9, 25 Am. & Eng. R. Cas., N. S., 9; *Burian v. Seattle Electric Co.* (Wash.), 1 R. R. R. 218, 24 Am. & Eng. R. Cas., N. S., 218; *O'Connell v. St. Paul City R. Co.* (Minn.), 4 Am. & Eng. R. Cas., N. S., 60; *Watson v. Mound City St. Ry. Co.* (Mo.), 3 Am. & Eng. R. Cas., N. S., 385; *Blaney v. Electric Traction Co.* (Pa.), 10 Am. & Eng. R. Cas., N. S., 560; *McDivitt v. Des Moines St. R. Co.* (Iowa), 6 Am. & Eng. R. Cas., N. S., 106; note, 10 Am. & Eng. R. Cas., N. S., 471.

*Fitzgerald v. Boston Elevated Ry. Co*

Exceptions from Superior Court, Suffolk County; Edgar J. Sherman, Judge.

Action by Daniel M. Fitzgerald against the Boston Elevated Railway Company. Plaintiff brings exceptions from a ruling directing a verdict for defendant. Judgment on verdict.

*J. J. Feely and Roger Clapp*, for plaintiff.

*Endicott P. Saltonstall*, for defendant.

LORING, J. The plaintiff started from the wrong, that is to say the left hand, side of a street, to cross the outward bound track of the defendant railway to take an inward bound car going to Boston. He testified that on seeing the inward bound car approach on the further track he looked both ways, did not see the outward bound car, and walked into it in going across the outward bound track to pass behind the inward bound car in order to board it. He said that the time when he looked was 20 seconds before he left the sidewalk, and it took about 20 seconds to walk across the road to the place where he was struck. A companion, McIsaac by name, who was crossing the street behind the plaintiff, said that as the plaintiff stepped on the outward bound track he, the plaintiff, looked back to see him, McIsaac. There was an arc light where the plaintiff was standing waiting for the car. It was agreed that the street at the place of the accident is straight for a distance of one-eighth of a mile from the place of the accident toward Boston. The accident happened at about midnight. It was a dark night and just misting rain. There was evidence that the outward bound car was going 20 miles an hour. On these facts the judge directed a verdict for the defendant, and the case is here on an exception to that ruling.

*Roberts v. N. Y., N. H. & H. R. R.*, 175 Mass. 296, 56 N. E. 559, relied on by the defendant, is not necessarily decisive of the case at bar because the crossing there in question was the crossing of a steam railroad. See *Finnick v. Boston & Northern Street Ry.*, 190 Mass. 382, 77 N. E. 500.

But the principle so clearly stated in *Roberts v. N. Y., N. H. & H. R. R.*, 175 Mass. 296, 56 N. E. 559, is in our opinion applicable in case of a street railway. In our opinion, if one crossing the tracks of a street railway testifies that he looked to see if a car was coming (when the car was in fact in plain sight) and that he did not see it, he must have looked carelessly and is in no better position than if he had not looked at all; as to which see *Itzkowitz v. Boston Elevated Ry.*, 186 Mass. 142, 71 N. E. 298; *Dunn v. Old Colony St. Ry.*, 186 Mass. 316, 71 N. E. 557; *Donovan v. Lynn & Boston Railroad*, 185 Mass. 533, 70 N. E. 1029; *Quinn v. Boston Elevated Ry.*, 188 Mass. 473, 74 N. E. 687. In the case at bar the plaintiff would have been guilty of contributory negligence had he walked into the car which ran over him without looking to see if a car was coming. The case at bar is not so strong a case for the plaintiff as the

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case of a plaintiff crossing a double line of tracks, who is run over by a car on the further track which was hidden from him by a car on the nearer track, behind which he drives on its passing him; as to which see *Stackpole v. Boston Elevated Ry.* (Mass.) 79 N. E. 740; *Bartlett v. Worcester Cons. St. Ry.*, 189 Mass. 360, 75 N. E. 706; *Saltman v. Boston Elevated Ry.*, 187 Mass. 243, 72 N. E. 950.

Judgment on the verdict.

**WIDER v. DETROIT UNITED RY.**

(Supreme Court of Michigan, March 12, 1907.)

[111 N. W. Rep. 100.]

**Street Railroads—Injuries to Travelers—Contributory Negligence.\***

—One who steps or drives on a railroad immediately in front of an approaching street car, and is struck, when, had he looked before so attempting to cross, he must have seen the proximity of the car and appreciated the necessary consequences of his act, is chargeable with negligence as a matter of law.

**Same—Failure to Look—Question for Jury.**—Where at the time plaintiff turned to cross a street car track, the car by which he was struck was more than 200 feet away, and at the time of the collision was running at an unusual, if not an unlawful, rate of speed, whether plaintiff was negligent in failing to look a second time as he was about to drive on the track was for the jury; plaintiff not being required to refrain from crossing because the car was in sight.

\*See preceding case, and foot-note.

Appeal from Circuit Court, Wayne County; George S. Hosmer, Judge.

Action by William Wider against the Detroit United Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before, McALVAY, C. J., and CARPENTER, OSTRANDER, HOOKER, and MOORE, JJ.

*Brennan, Donnelly & Van De Mark*, for appellant.

*Skinner & Wider* and *Frank D. Andrus*, for appellee.

HOOKER, J. The undisputed testimony in this case establishes the fact that the plaintiff, driver of an ice wagon, attempted to cross the defendant's street car track, when his horses, proceeding upon a walk, were struck by a car coming from the same direction that the plaintiff had been driving. He was driving in a covered wagon, with openings at his side, through which he could look out. He testified that before attempting to cross he looked by "bending or hanging out" of said opening to see whether a car was coming, and did not see

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any; that his horses' heads were then 13 feet from the railway; and that he immediately started them toward the track, with the intention of crossing. There is nothing to indicate that he looked again, or saw any car, until just before the car struck the team. On the contrary, the testimony indicates that he did not. The important question in the case is that of contributory negligence. The accident happened in the evening, and the street was lighted by arc lights. There is testimony that there was no light upon the car, or inside of it, though the contrary was proved by a strong preponderance of proof. The principal witness for the plaintiff said that he did not see any lights in or upon the car, but that he saw the car at Burns avenue, 226 feet from the place of the accident, as the plaintiff turned to cross the track. It does not appear that he saw it again until an instant before it struck the plaintiff's horses. Plaintiff recovered a judgment, and the defendant has appealed.

We have held that one who steps or drives upon a railroad immediately in front of an approaching street car, and is struck, when had he looked before so attempting to cross, he must have seen the proximity of the car, and the necessary consequences, is chargeable with contributory negligence as a matter of law (*Houghton v. Ry.*, 99 Mich. 308, 58 N. W. 314; *Kelly v. Hendrie*, 26 Mich. 261; *Fritz v. Ry.*, 105 Mich. 50, 62 N. W. 1007; *Borschall v. Detroit*, 115 Mich. 477, 73 N. W. 551; *Henderson v. Ry.*, 116 Mich. 374, 74 N. W. 525; *Doherty v. Railway*, 118 Mich. 209, 76 N. W. 377, 80 N. W. 36; *McCarthy v. Detroit*, 120 Mich. 400, 79 N. W. 631; *Merritt v. Foote*, 128 Mich. 367, 87 N. W. 262; *Garrity v. D. U. R.*, 112 Mich. 374, 70 N. W. 1018, 37 L. R. A. 529) and that such nearness of the car is sometimes demonstrable from the circumstances of the accident. On the other hand, we have held that a man is not required to refrain from crossing whenever a car is in sight, and that there are cases where he may properly exercise his judgment upon the question of when he should attempt to cross the track, and in such cases he may or may not be guilty of contributory negligence, and whether he is or not is usually a question for the jury. The application of this rule is most common in cases where the car is seen, but its distance or speed is miscalculated. (*Garrity v. Street Ry. Co.*, 112 Mich. 369, 70 N. W. 1018, 37 L. R. A. 529; *Chauvin v. Railway*, 135 Mich. 85, 97 N. W. 160) or cases where there is evidence justifying the conclusion that the injured party looked, and that no car was visible, within such a distance as would justify him in making an attempt to cross (*Ryan v. Railway*, 123 Mich. 599, 82 N. W. 278; *Moran v. Det. Ry.*, 124 Mich. 582, 83 N. W. 606). See, also, *Garrity v. D. U. R.*, 112 Mich. 369, 70 N. W. 1018, 37 L. R. A. 529.

In the present case the jury would have been justified in finding that the plaintiff was negligent in not looking just before driving upon the track, if he did not look, and it was certainly open to the jury to find that, had he looked, he must have seen the car to be so near that it would be reckless to try to cross in

## Pittsburg Ry. Co. v. Cluff

front of it. Indeed, if this record permitted, we should be inclined to reverse the judgment as contrary to the clear weight of evidence. But, on the other hand, there is testimony which if believed would justify the conclusion that, at the time the plaintiff turned to cross the track, the car was more than 200 feet away, and that, at the time of the collision, it was running at an unusual, if not an unlawful, rate of speed, and while perhaps a distance of 200 feet may leave a doubtful margin of safety, to one crossing in front of a swiftly moving car, without looking immediately before driving upon the track, it may be otherwise, where the speed is less. If we could say that the undisputed testimony was to the effect that this plaintiff drove upon the track when this car was so near that it must have been seen and the danger apprehended, had plaintiff looked, we should reverse the judgment under the rule of the cases cited; but, as there was an opportunity to find that the distance was 200 feet or more when he looked, we are of the opinion that it was for the jury to say whether an attempt to cross would have been negligent, even had plaintiff seen the car, under the rule of the case of *Garrity, supra*, provided they should find that the testimony referred to was true.

The only other point raised relates to the argument of counsel on the subject of damages. We are of the opinion that the cause should not be reversed on this ground.

Judgment affirmed.

## PITTSBURG RY. CO. v. CLUFF.

(Circuit Court of Appeals, Third Circuit, January 17, 1907.)

[149 Fed. Rep. 732.]

**Street Railroads—Injury to Person on Tracks—Contributory Negligence.\***—A plaintiff who, after seeing a street car approaching while he was still upon the sidewalk, started to cross a curved track which led into a cross street without again looking, and was struck by the car and injured, was chargeable with contributory negligence as matter of law, and cannot recover for the injury; nor is he relieved from such negligence by the fact that there was another track, which went straight ahead past the corner.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

*James C. Gray*, for plaintiff in error.

*Thomas M. Marshal*, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

DALLAS, Circuit Judge. The defendant in error brought an

\*See preceding case, and foot-note.



*In re Mantorville Ry. & T. Co. v. Slingerland*

action against the plaintiff in error to recover damages for personal injuries to the plaintiff below, caused by his having been struck, while crossing one of the streets of the city of Pittsburg, by an electric railway car operated by the defendant below. At the close of the trial the court was requested to charge that "under all the evidence the verdict must be for the defendant"; and the refusal of this request, amongst other things, is here assigned for error.

It may be assumed that the defendant's servants were not as careful as they should have been, for we rest our decision solely upon the ground that it was conclusively shown that the proximate and decisive cause of the accident was lack of ordinary prudence upon the part of the plaintiff himself. There was no conflict of evidence. The defendant offered none. By the plaintiff's own testimony it plainly appeared that while he was still upon the sidewalk he saw the car coming. He did not wait, however, nor look again, but stepped directly in front of it. It was moving rapidly—perhaps too rapidly; but he realized this, and therefore should have been especially careful. He did not know that it would leave the straight track and follow the curve by which it reached the point at which he was struck; but the curved track was as plainly within his view as the straight one, and there was nothing to justify him in proceeding upon the assumption that the car would not make the turn. In short, there was no support whatever for any inference other than that the accident was directly due to the plaintiff's own heedlessness, and consequently the binding instruction for which the defendant asked ought to have been given.

The judgment is reversed.

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*In re MANTORVILLE RY. & TRANSFER CO. MANTORVILLE RY. & TRANSFER CO. v. SLINGERLAND.*

(Supreme Court of Minnesota, July 12, 1907.)

[112 N. W. Rep. 1033.]

**Eminent Domain — Compensation — Measure—Special Benefits.\*—** Special benefits may be set off, in proceedings to condemn a right of way for a railroad company, against the value of the part taken and damages shown to have accrued to the remainder.

**Same.\*—**The term "special benefits," as used in condemnation of railway right of way, has the same meaning and is governed by the same principles as when employed in highway, drainage, or ordinary municipal improvement proceedings only in so far as private property is taken for public use by such proceedings.

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\*See foot-notes appended to *Cox v. Philadelphia, etc., R. Co. (Pa.)*, 24 R. R. R. 249, 47 Am. & Eng. R. Cas., N. S., 249; *St. Louis, etc., R. Co. v. Continental Brick Co. (Mo.)*, 21 R. R. R. 482, 44 Am. & Eng. R. Cas., N. S., 482.

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**Same.\***—In other cases, the identity of meaning and principles is to be determined with due reference to distinctions with respect to the exaction of payment as a condition precedent to subsequent use of railway facilities only, to the natural difference in accessibility to the improvement, and to the judicial nature of proceedings to condemn, as distinguished from the administrative character of ordinary local improvement assessments.

**Same.\***—Such benefits must be pro tanto a fair equivalent for land parted with and damages inflicted. To that end they must be special, not common; direct, not consequential; substantial, not speculative; proximate, not remote; actual, and not constructive.

**Same.\***—The usual beneficial results of the mutually advantageous arrangement between a state and a railway company having the right to exercise the power of eminent domain are not special benefits.

**Same.\***—Mere increase in facilities of transportation does not amount to a special benefit.

**Same.\***—A railroad in this case constructed its line over land, some of which was taken for use as a part of its right of way, along the only feasible route to reach stone quarries. The land without the road was of no immediate value for commercial or quarrying purposes, but with the road was possibly of considerable value for such uses. It is held that such value was not a special benefit.

(Syllabus by the Court.)

Appeal from District Court, Dodge County; Thomas S. Buckham, Judge.

Condemnation proceedings by the Mantorville Railway & Transfer Company against Teunis Slingerland, Jr. Judgment for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

*George A. Norton and Samuel Lord*, for appellant.

*Bunn T. Willson and Chas. C. Willson*, for respondent.

JAGGARD, J. In 1896 the plaintiff and appellant railway company, on notice to defendant and respondent, presented its petition to the district court, describing the route of its proposed railroad and the land of defendant it desired to appropriate, and asked the appointment of three commissioners to appraise damages. The commissioners, duly appointed, appraised defendant's damages at \$575, and in 1896 filed their report. Both parties appealed from the award. The company gave the statutory bond, took possession of the land, and constructed its railroad over it. The proceedings on appeal were continued from time to time until 1906, when they were tried. The jury returned a verdict in favor of defendant for \$1,050. This appeal was taken from an order of the trial court denying plaintiff's motion for a new trial.

The assignments of error are addressed to the rulings of the trial court in excluding evidence of special benefits to the land, due to the facts that the road was constructed along the only feasible route to reach two stone quarries on defendant's premises,

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\*See foot-note on preceding page.

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part of which premises were taken for the right of way, and that without the road the lands were of no value for quarrying or commercial purposes, but with the road, constructed as it was, the quarries were worth over \$1,500. The defendant insists that this testimony was directed to show the value of the two stone quarries on his premises, both of which were opened and operated at a time long subsequent to the commencement of these proceedings, the taking of the land, and the construction of the road by the company, and that the testimony did not tend to show benefits to the defendant's land at the time at which such benefits are to be determined according to law. *Sherwood v. Railway Co.*, 21 Minn. 122; *Warren v. Railroad Co.*, 21 Minn. 424; *Whitacre v. Railroad Co.*, 24 Minn. 311. See, however, *Morin v. Railway Co.*, 30 Minn. 400, 14 N. W. 460; 18 Cent. Dig. "Eminent Domain," §§ 325-402. Construing the assignments of error and the record on which they are based with the liberality required by current appellate practice, we are of the opinion that the appeal is sufficient to present the merits of the controversy.

The essential question upon the merits is whether the court erred in holding that there were no special benefits available as a set-off shown or offered to be shown in this case. Plaintiff's argument upon the facts was that defendant's lands, having stone quarries upon them, must have been specially benefited by the building of a railroad across his property so near to the quarries that they could be easily reached. While it recognizes that at the time of taking the lands the railroad could not have been compelled to build a spur track, this, it insists, did not deprive the road of the right to deduct the value of the special benefit. "Railroads are built, among other things, to carry freight. Stub roads are built, as a rule, for the very purpose of reaching quarries, factories, mills, mines, and the like; and the fact that they are built for such purposes makes it reasonably certain that they will furnish necessary connections and switches." In support of and in opposition to this contention we are referred to many decisions, which counsel for the respective parties have collated with industry and classified with ingenuity. These decisions, the authorities therein referred to, and others which we have examined, reproduced many shades of opposing opinion. Frequently little heed has been paid in these opinions to the nature of the proceeding under which the question has arisen and to the subject-matter to which the benefits pertained. Much of their lack of harmony is due, also, to the failure to observe the varying rules adopted by the various jurisdictions with respect to whether either, neither, or both general and special benefits may be used as a set-off, and whether such counter-claims avail as to either, neither, or both the value of the part taken and damages to the remainder. There is observable in these authorities a general inclination to deduce the rule from the term "special benefits," and to treat that phrase as if it were feasible from it to determine, *a priori*, by reasoning of mere nominalists, how the owner of property shall be compensated for what part of

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his estate has been taken by power of law. Under the circumstances, it is desirable (1) to distinguish between the varying proceedings and subject-matter involved in each, respectively; (2) to advert to fundamental principles, and to note the pertinent rules of law adopted in different jurisdictions; and (3) to reach a conclusion in this case with regard, not to the phrase "special benefits," but to the substance of the actual conditions of fact presented by this record.

1. The term "special benefits" is used indiscriminately, as if its meaning were identical in cases of judicial highways and ditches, assessments for local improvements, and in condemnation proceedings. There are, however, substantial, but neglected, distinctions arising from the nature of these proceedings and the subject-matter to which they apply. The primary basis of distinction is that in condemnation proceedings only is part of the land invariably taken by eminent domain. It may or may not happen that highway, drainage, or municipal improvements include this exercise of that sovereign power of the state. It is only when this occurs that the term "special benefits" has exactly the same meaning, and that the identical principles apply to it as when employed in proceedings to condemn a right of way by a railway company. See *Arbrush v. Town of Oakdale*, 28 Minn. 61, 9 N. W. 30.

Another distinction is this: Of these cases, a railway company only secures lands for a public use for which the public is subsequently required to pay. When abutting property is charged for the construction of a sewer, a street, a sidewalk, a drain, or a ditch, or when property within a district is assessed for a park, a boulevard, a fill, or the like, no subsequent charge is made for use. It is true, however, that a water frontage assessment may be levied and a subsequent water rate be collected for water furnished; but even here no direct charge is made for incidental fire protection.

Another distinction is to be found in the accessibility of the improvement. When, for example, a street is opened through a man's property, he has, subject to reasonable regulation, instantaneous and immediate access to and egress from his property at every part of the street. Practically every other municipal improvement, and judicial highways and ditches, confer upon abutting owners similar privileges. In all such cases the right so conferred may be enforced by process. When a railroad, however, is constructed through a man's property, he may or may not have access to it at particular places. It is a question in the first place of statutory provision, and in the second place of fact, whether he can secure the exercise of discretion on the part of public officers in ordering the construction of a spur track, the furnishing of switch connections, or the location of a station. Under no circumstances is his privilege in this regard at all analagous to the complete, if not absolute, right of property owners to enjoy municipal improvements for which they have been assessed.

The final distinction is this: The ordinary local assessments

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are made by the administrative branch of the government, and the ability of the court to control them is limited in the extreme. The emphasis placed on the power of the executive to determine questions of benefits which may be charged to property owners, entirely free from judicial interference, which was given by the decisions of the federal Supreme Court practically overruling *Village of Norwood v. Baker*, is recent and impressive. Condemnation proceedings and the current drainage and highway proceedings are judicial. It is accordingly within the power of the courts in such proceedings, in a measure at least, to prevent the practical confiscation of private property by a mere resolution of an official or of an official body, determining that a given improvement has conferred special benefits upon the owners thereof in an amount found. This the executive branch of the government has the power to do; and, as said experience shows, this power it constantly exercises. The courts, under the doctrine in force at present, may relieve in extreme cases only, if at all. *French v. Barber Asphalt Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879. In judicial proceedings, however, a consistent and a visible effort has been made to prevent plunder of landowners through the device of merely constructive benefits. *Swenson v. Board of Supervisors*, 95 Minn. 161, 103 N. W. 895. The analogy of the judicial highway and ditch proceedings may accordingly be somewhat closer to railway condemnations than that of the ordinary local assessment.

We conclude that "special benefits," as defined in these allied proceedings, bears an analogy to "special benefits" in railway condemnation proceedings, but an analogy which is often remote, and which is likely to be misleading. The authorities of this kind to which we have been referred by plaintiff do not aid in the solution of the present problem. It is unnecessary to discuss them in detail.

2. The various courts, starting with essentially the same premises, have reached very different rules for the determination of what is a special benefit in railway condemnation proceedings, and have varied still more in the application to the facts presented of the formulæ which they have adopted. The common premises are the constitutional provisions of which those of this state are typical. Private property "shall not be taken for public use without just compensation." Section 13, art. 1, Const. Minn. "In all cases a fair and equitable compensation shall be paid for such land and the damages arising from taking the same." Section 4, art. 10, Const. Minn. Under similar constitutional provisions, it is the law of many jurisdictions that the land taken must be paid for in money, and cannot be paid for in mere "benefits." The argument in that connection is nowhere better stated than by Wilson, C. J., dissenting, in *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515 (Gil. 392) 418, 83 Am. Dec. 100: "If the Legislature has a right, under our Constitution, to say that a party may be compensated for his land taken for public use in 'benefits,' it may also say that he may be compensated

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in onions, sheep, provisions, or tobacco, or any other useful or useless thing. Either they have no power, or unlimited power, to designate the currency or commodity in which payment may be made. To my mind it seems clear that the Constitution, properly interpreted, gives them no power in the premises. When the public or a corporation takes the property of an individual, it becomes indebted to him for its value, and should pay that debt in that which, by the law of the land, should be deemed a legal tender payment of any other debt."

Quite generally, however, courts have recognized the propriety of allowing benefits conferred as a set-off. Mr. Lewis has thus arranged the different jurisdictions with respect to the rule in force in each, respectively: "(1) Where special benefits may be set off against damages to the remainder, but not against the value of the part taken. (2) Where benefits, whether general or special, may be set off as in the last proposition. (3) Where special benefits may be set off against both damages to the remainder or the value of the part taken. (4) Where both general and special benefits may be set off as in the last proposition." The decisions of this state put it in the third of these classes. Lewis on Eminent Domain, p. 1000, § 465.

With respect to the nature of the benefit which may be used as a set-off, there is a general consensus of opinion that the benefit must be pro tanto a fair equivalent for the land parted with and the damages inflicted. Various adjectives are currently used to define the character of these benefits. They must be special, as distinguished from common (*Weir v. Railway Co.*, 18 Minn. 155 [Gil. 139]; 18 Cent. Dig. Em. Dom. § 390 et seq.; 7 Current Law, 1294; actual, as distinguished from constructive (*Swenson v. Supervisors*, 95 Minn. 161, 103 N. W. 896); substantial, as distinguished from speculative (*Whitely v. Miss.*, etc., *Boom Co.*, 38 Minn. 523, 525, 38 N. W. 753; *Haynes v. City of Deluth*, 47 Minn. 458, 50 N. W. 693; *Metropolitan, etc., Ry. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773); direct, as distinguished from consequential (18 Cent. Dig. Em. Dom. § 390); and proximate, as distinguished from remote (*Jeffersonville, etc., Ry. Co. v. Esterle*, 13 Bush. [Ky.] 667). These terms represent particular aspects of facts in issue and serve to show the uniform intention of the courts to prevent the violation of the Constitution by taking a man's land without pay by mere equivocation and to actually pay him for what he has parted with and for what damage he has suffered.

In order that it should be, in any literal sense, practical compensation, the benefit must be peculiar to the individual, part of whose land has been taken, and not such as accrues to adjacent landowners generally. What advantage has been received by other owners whose lands have not been taken could, by legal juggling only, be considered as payment for lands segregated for railway use. For example, suppose that a railway running



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through an open country would take part of lands of one set of owners, including, as the chance might be, all improvements of value. Other sets of owners would receive the same general advantages accruing from increased facilities for transportation. All would profit, but only the first set would pay; for their property would be appropriated and paid for in part by the consequent increase in value which others would receive gratis. "One pays for the other's 'benefit.'" *Guinn v. Railway Co.*, 46 W. Va. 151, 157, 33 S. E. 87, 76 Am. St. Rep. 806. See *Cooley*, Const. Lim. 570; note to *Symonds v. Cincinnati*, 45 Am. Dec. 533. The common benefits from the construction of a railway are the natural sequences of a mutually advantageous arrangement. A railway company is given by the state the right to exist, to enjoy the usual corporate powers, to exercise the extraordinary and sovereign power of eminent domain, and to charge toll for the services it may render to the public. Incidentally in this state it is exempt from ordinary taxation. The railway profits by the exercises of these powers and privileges in the collection of its authorized charges; the public, by the privilege of buying improved transportation at uniform and reasonable rates. That railway company property and stock increase in value, and that the community through which the railway passes finds its lands made more valuable and its prosperity increased, is the accomplishment of the very purposes for which the sovereign state conferred these franchises and privileges upon corporations of this class. It makes no difference whether the advantage to landowners consists in providing an immediate market for their products, agricultural, mineral, or manufactured, or in transporting them to remoter markets. The farmer, who sells grain, hay, stock, or dairy products, the quarryman, who sells building stone or ballast, and the merchant or manufacturer, who may or who may not own land, but whose business is made or increased, share in a common advantage which is their lawful due. Increased facilities for transportation of natural products at reasonable rates are not in logic legal tender for the part of lands of private owners taken under power of eminent domain and for damages to the remainder.

A tangible estimate of the value of such facilities is in the increased value of the land. Any other means of determination would be speculative in the extreme. It is well settled, beyond dispute, that enhancement of value of land standing alone is not a special benefit. A benefit is special, by any reasonable construction, only when the road is so constructed as to give the land in question an increased value above the general appreciation of property in the neighborhood. Mere general appreciation, consequent on projected or actual construction of the road, cannot, in any view of the case, be set off against damages for the taking of the land; and this is the rule even in Pennsylvania. *Mahaffey v. Beech Creek, etc., Ry. Co.*, 29 Atl. 881. 163 Pa. 158. And see *Miss. Ry. Co. v. McDonald*, 59 Tenn. 54; *So. Ill. Bridge Co. v. Stone*, 194 Mo. 175, collecting cases

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at page 188, 92 S. W. 475; *Tracewell v. Wood County Court*, 52 S. E. 185, 187, 58 W. Va. 283. The logic of the situation has led many courts to insist that benefits, to be used as a set-off, in order that they may be special, must alter the physical character of the land. "The benefits to be deducted must be those resulting directly to the land, a part of which is taken, from the construction of the road, not through the vicinity, but through the land." *McMillan, J., In Winona & St. Peter Ry. Co. v. Waldron*, 11 Minn. 515 (Gil. 392, 413), citing many cases. "The benefits to be considered and allowed by the jury, where only a part of an entire tract is taken, are not such as are common lands generally in the vicinity, but such as result directly and peculiarly to the particular tract in question; as, for instance, where property is made more available and valuable by opening a street through it, or when land is drained or otherwise directly improved." *Vanderburgh, J., in Whitely v. Miss., etc., Boom Co.*, 38 Minn. 523, 525, 38 N. W. 754. "The benefit must result from the construction, and not from the location, of the railroad." *State v. Evans*, 3 Ill. 208. "The benefit which may thus be allowed is one which enhances the value of land affected by it, by improving its physical condition and adaptability for use, such as by reclaiming waste lands, by draining or flowing a marsh, by aiding in the development of a water power, by dispensing with the necessity of maintaining fences [which is not the law in Minnesota], or opening a mine or quarry, or the like." *Washburn v. Mil., etc., Ry.*, 59 Wis. 365, 376, 18 N. W. 328, 334. The conclusion of Mr. Pattison, in his excellent article on "Eminent Domain" in 15 Cyc., at page 771, is: "In order that the benefits may be deducted, they must be special and local, and such as result directly to the particular tract of land of which a part is taken." Among the familiar illustrations of such local benefits are: The drainage of lands (*Old Colony Ry. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194); the filling up of an old canal (*Whitman v. Railroad*, 3 Allen [Mass.] 133); access to a pond for cattle and ice (*Fitz v. Nantasket, etc., Ry.*, 147 Mass. 35, 18 N. E. 592; cf. *Paine v. Wood*, 108 Mass. 166); the formation of a mill pond by the construction and maintenance of a necessary embankment (*Sullivan v. North Hudson Ry.*, 51 N. J. Law, 518, 18 Atl. 689); a periodical flooding, likely to add alluvium and enrich land (*Mil., etc., Ry. Co. v. Eble*, 4 Chand. [Wis.] 72; *Id.*, 3 Pin. [Wis.] 334); construction of a main sewer, making proper drainage of the property traversed less expensive (*Butchers', etc., Ass'n v. Commonwealth*, 169 Mass. 118, 47 N. E. 599; *Trinity College v. Hartford*, 32 Conn. 452, 477).

In the light of these considerations, we come to view the specific cases to which plaintiff refers us to the effect that increased transportation facilities and the feasibility of connecting industrial works upon the tract with the road are "special benefits." Of these *Reading, etc., Ry. Co. v. Balthasar*, 126 Pa. 9, 17 Atl. 518, is especially apt. There a quarry had been

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opened at a time when a canal was the only available line for its products. The defendant railway company built a road to and across plaintiff's lands. It was held that whether this additional line of transportation was or was not an advantage to the owners of the quarry was a proper subject for consideration by the jury. Therefore the true inquiry was whether a broader market and better facilities for shipment were put within plaintiff's reach by the building of defendant's road, or, in other words, whether there were advantages to be set off against the disadvantages arising from the appropriation of the plaintiff's land for the right of way of the road. So the courts have found special benefits to consist of increased transportation facilities for marketing coal (*C., S. F. & C. Ry. v. McGrew*, 104 Mo. 290, 15 S. W. 931); in connection with a mill for the reduction and treatment of ores (*Colo. Cent. Ry. Co. v. Humphrey*, 16 Colo. 34, 26 Pac. 165); in connection with future manufacturing enterprises (*St. L., etc., Ry. Co. v. Fowler*, 142 Mo. 680, 44 S. W. 771; cf. *St. L., etc., Co. v. Stockyards Co.*, 120 Mo. 541, 25 S. W. 399); in connection with a situation resulting in the conversion of ordinary land into factory sites (*Hartshorn v. Ill., etc., Ry. Co.*, 75 N. E. 122, 216 Ill. 392).

A number of considerations serve to subtract from the apparent weight of this class of authorities. With respect to the Pennsylvania cases, it is to be noted, as Mr. Justice Gordon said in *Pittsburg, etc., Ry. Co. v. Robinson*, 95 Pa. 426, 430: "It is conceded that, under our acts of assembly, the owners of mills and manufactories may of right connect their private sidings with the railroads in the vicinity, and though, as the counsel for the defendant in error says, it does not follow that such owners may ever avail themselves of such right, nevertheless the fact that such a right exists in them may largely advance the market value of their several properties. Certainly privileges which may be used to facilitate transportation to and from large factories must have some effect upon their values." No such right exists in Minnesota. While the definition of special benefits formulated in Pennsylvania has been essentially the same as in this state (see *Hornstein v. Railway Co.*, 51 Pa. 87; *Long v. Railway*, 126 Pa. 143, 19 Atl. 39), none the less, as Mr. Gould has pointed out: "The measure of damages laid down in these cases would seem to permit general benefits to be set off." 2 Gould, Em. Dom. p. 1010, note 17. The New York elevated road cases are not in point, because the rule applicable thereto is that, in estimating benefits resulting from the construction of such a road, not only those peculiar to the premises, but also those shared with neighboring property, should be considered. *Saxton v. Railway*, 139 N. Y. 320, 34 N. E. 728; cf. *Peabody v. Elevated Road*, 191 Mass. 513, 78 N. E. 392.

Plaintiff also argues from cases which hold that the building of a station near a tract of land confers a special benefit. Shat-

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tuck *v.* Stoneham Branch Ry. Co., 6 Allen (Mass.) 115; Bowman *v.* El. Ry., 137 N. Y. 802; Nette *v.* N. Y. El. Ry., 20 N. Y. Supp. 627, 1 Misc. Rep. 342; Pittsburg, etc., Ry. Co. *v.* Robinson, 95 Pa. 426; cf. City of El Paso *v.* Coffin (Tex. Civ. App.) 88 S. W. 502. A number of circumstances, part of which are elsewhere herein referred to, peculiar to the individual cases, serve to distinguish these authorities more or less clearly from the instant case. In Massachusetts it has been held that, before the station has been in fact established, it could not be determined whether the benefits were of a sufficiently certain character to affect the damages. Brown *v.* Railway Co., 5 Gray (Mass.) 39. The opinion that the building of a station or of an elevator is not a special benefit, which is that of this court (Minn. Central Ry. Co. *v.* McNamara, 13 Minn. 508 [Gil. 468]), is the rule also in Illinois (I. & M. Ry. Co. *v.* Borms, 219 Ill. 179, 76 N. E. 149), and in Wisconsin (Washburn *v.* Mil., etc., Ry. Co., 59 Wis. 376, 18 N. W. 328).

A number of cases tending to support plaintiff's claim are distinguishable, because the set-off was allowed against damages by inconvenience, or incidental damages only (Chi. & E. I. Ry. Co. *v.* Rottgering, 83 S. W. 584, 26 Ky. Law Rep. 1167; and see Union, etc., Ry. Co. *v.* Raine, 86 S. W. 857, 114 Tenn. 569); others, because of the peculiarity of statutory provisions or ordinances (St. L., etc., Co. *v.* Fowler, 142 Mo. 67, 44 S. W. 771, where, under a statute in force at the time of trial, the owner had a qualified right to switching connections); others, because of the statutory definition of benefits (Colo. Cent. Ry. Co. *v.* Humphrey, 16 Colo. 64, 26 Pac. 165; cf. Sexton *v.* N. Bridgewater, 116 Mass. 200, 206). Drury *v.* Midland Ry., 127 Mass. 571, 582, expressly does not decide that evidence as to the feasibility of putting in a sidetrack on petitioner's land was admissible.

While the cases which are inconsistent with defendant's position may be distinguished more or less clearly from the case at bar, it must, however, be recognized in candor that many of them lend support to the plaintiff's contention, and that the defendant can prevail in this case only by disagreeing with them in some measure. As has been pointed out, however, we think that on principle the mere increase of transportation facilities and the prospective feasibility of connecting industrial works upon the tract with a railroad are not ordinarily sufficient to constitute special benefits, at least where the landowner cannot by law compel the railroad company to furnish him with particular facilities. The more nearly specific authorities agree with the general trend of decisions, previously referred to, in enforcing this rule. We are referred to Russell *v.* St. P., M. & M. Ry. Co., 33 Minn. 210, 22 N. W. 379, as being an authority to the contrary. There is no force in this contention. In that case Vanderburgh, J., said: "The only question is as to the amount of plaintiff's damage, being in this case the value of the lot in controversy." No question as to benefits, general or

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special, was there involved. On the contrary, the following advantages have been held not to be proper matter for set-off: The removal of a cemetery (*Minn. Cent. Ry. Co. v. McNamara*, 13 Minn. 514 [Gil. 468]; providing a market for wood or ties (*Minn. Valley Ry. Co. v. Doran*, 17 Minn. 188 [Gil. 162]); building fences along the right of way (*Trogden v. Winona, etc., Ry. Co.*, 22 Minn. 198). In *Arbrush v. Town of Oakdale*, 28 Minn. 61, 9 N. W. 30, this court said, per Mr. Justice Clark, that the only advantages and benefits which can be used as a set-off are such as "are direct and special to the land a part of which is taken. 'The kind of benefit which is not allowed to be estimated for the purpose of being deducted from damages is that which comes from the claimant sharing in the common convenience of increased public facilities and in the advance of real estate in the vicinity by reason thereof. *Allen v. City of Charleston*, 109 Mass. 243.'" So in other jurisdictions it has been held that a special benefit is not made out by the fact that the construction of a railroad opened a market for the owner's coal and wood (*Grafton, etc., Ry. Co. v. Forman*, 24 W. Va. 662); or that it enabled the shipment and sale of adjacent trees (*Haislip v. Wilmington, etc., Ry. Co.*, 8 S. E. 926, 102 N. C. 376), which are suitable for ties (*Childs v. N. H., etc., Ry. Co.*, 133 Mass. 253). In *Romano v. Yazoo & M. V. R. Co.*, 40 South. 150, 87 Miss. 721, it was held: "In an action for damage to property by the construction and operation of a switch track in front of it, evidence of the enhanced value of that property for warehouse purposes by reason of the building of the track was not admissible; the property not being used for such purpose." And see *Guinn v. Railway Co.*, 46 W. Va. 151, 157, 33 S. E. 87, 76 Am. St. Rep. 806.

3. In the case at bar the possibility or the probability that the railroad company would construct or maintain stub tracks or permit switch connections, whereby defendant's quarries would make his land valuable, is not a special benefit to be offset against the value of the part of his land taken by the railroad company or damages to the remainder. That benefit accrued to the community in general. It was such a benefit as defendant might have received if the railroad had been constructed through the country, but had not crossed his farm. See *Carli v. Railway Co.*, 16 Minn. 260 (Gil. 241); *Winona, etc., Ry. Co. v. Waldron*, 11 Minn. 515 (Gil. 392), 83 Am. Dec. 100. If, for example, the railroad company had run along the boundary line of his neighbor's land, that neighbor would have had identical advantages and would have paid nothing. The defendant is not required to pay in part for the same thing which his neighbor received gratis. The benefit was not direct nor local. The construction of the road did not physically alter defendant's lands to his advantage. It did not open a quarry, as by making a cut and exposing the stone. In this connection it is to be noted that this entire section of the state is underlaid with limestone, whose value is largely determined by its quality. A quarry is

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not so common as a field, but is of so frequent occurrence that the benefit of transportation facilities accrues to property owners quite generally and is highly uncertain, if not speculative. The benefit was contingent, and dependent upon the right of the railroad company to permit or refuse direct connection with it. Indeed, it might never accrue in fact. If it existed at all, the benefit was constructive, not actual. Any use the landowner might make of any spur track or switch connection would be "merely permissive, and subject to the paramount right of the railroad company." See *Old Colony R. Co. v. Miller*, 125 Mass. 1, 5, 28 Am. Rep. 194; *Ranlet v. Railroad Co.*, 62 N. H. 561. It would be an unjust discrimination against this landowner to require him to pay for the privilege of paying the plaintiff for the transportation of his freight. The trial court was clearly right.

Order affirmed.

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**CITY OF DETROIT v. DETROIT MANUFACTURERS' R. R.**

(Supreme Court of Michigan, Oct. 4, 1907.)

[113 N. W. Rep. 365.]

**Taxation—Railroad Property—What Constitutes.\***—A company organized under Comp. Laws 1897, c. 167, built a railroad in the streets of a city, as authorized by an ordinance thereof, to carry freight from manufactories not otherwise accessible by steam railroads. The railroad was operated as a steam railroad, and was leased to a steam railroad, which used it in connection with its own road. Held, that the railroad was railroad property, within Pub. Acts 1901, p. 245, No. 173, as amended by Pub. Acts 1903, p. 57, No. 45, providing for the taxation of railroad property, and was not subject to local taxation, at least unless the ordinance imposed as a condition a liability for such taxes.

Case-Made from Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Action by the city of Detroit against the Detroit Manufacturers' Railroad. There was a judgment for plaintiff, and defendant brings error on case-made. Reversed, and new trial ordered.

Argued before McALVAY, C. J., and CARPENTER, OSTRANDER, HOOKER, and MOORE, JJ.

*N. E. Slaymaker* (Henry Russel, of counsel), for appellant.  
*Frank E. Doremus* and *Timothy E. Tarsney*, for appellee.

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\*For the authorities in this series on the subject of what is, and is not, taxable as part of a railroad company's right of way, roadbed, or tracks, see foot-notes appended to *Chicago, etc., R. Co. v. People* (Ill.), 18 R. R. R. 826, 41 Am. & Eng. R. Cas., N. S., 826.



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HOOKE, J. This is an action brought by the city of Detroit against the defendant, a corporation organized in March, 1902, under the provisions of the general railroad law of the state (Comp. Laws 1897, c. 164), to recover for taxes assessed for the years 1903 and 1904. The action was defended upon two grounds, and error is alleged upon the refusal to enter a judgment for the defendant. The grounds referred to are: (1) That the tax was void, not having been assessed by the state board of assessors, under Act No. 173, p. 236, Pub. Acts 1901, as amended by Act No. 45, p. 52, Pub. Acts 1903. (2) That the tax for 1903 was void for the reason that it was assessed against the Detroit Terminal Railway Company, and not against the defendant.

It was proved upon the trial that the city tax roll for 1903 shows that the Detroit Terminal Railway, was assessed for that year on a personal property valuation of \$100,000, the tax levied being \$1,656.82, which, with accrued interest, amounted to \$2,151.37 at the time of the trial; that the roll for 1904 showed an assessment against the defendant on the same valuation, the tax levied being \$1,532.71, amounting to \$1,827.74 at the time of the trial; and that no part of said taxes, or either of them, had been paid. It was also shown that the Detroit Transit Railroad was incorporated September 21, 1872, under the train railway act (chapter 167, Comp. Laws 1897), that on March 23, 1873, the city council passed an ordinance granting to the Detroit Transit Railway, for a period of 30 years, the right to construct and operate a railway in certain streets of the city of Detroit, from such a point as it and the Detroit & Milwaukee Railway might agree upon, for a connection to the eastern limits of the city, subject to said corporation obtaining the right through private property on the line of the road. These rights were extended for 30 years by a new ordinance in 1901. The ordinance required the use of animal power at certain hours of the day, permitting the use of steam and other power to operate the trains between the hours of 6 p. m. and 6 a. m. The road was built and put in operation. The Detroit Terminal Railway was also organized under the train railway law on July 26, 1901, and on September 23d of that year purchased all of the railroad property rights, and privileges of the Detroit Transit Railway. On March 31, 1902, the defendant purchased from the Detroit Terminal Railway all of its property and rights, and during 1903 and 1904 owned the same, and the road was during those years operated by the Michigan Central Railroad Company, a corporation existing under the general railway laws of the state, for switching cars and transporting freight for shippers along the line thereof, and to points beyond, in the United States and elsewhere. It appeared that, by an agreement between the defendant and the Michigan Central Railroad Company, the exclusive possession and control of the road was transferred to the latter company for 25 years from the time when the road should be reconstructed by said company. It has been

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in its possession since April, 1902, has been operated by steam power, and since that date has been reconstructed. It was admitted, subject to the objection of immateriality, that all of the property of the defendant was taxed by the state board of assessors in 1903 and 1904 on a valuation of \$100,000, and that it paid taxes pursuant thereto in 1903 amounting to \$1,691.15. At the time of the trial it had not paid the tax for 1904, but claims to have done so since. Defendant has appealed from judgment for the plaintiff.

Counsel for the city say that the only question in the case is whether the personal property formerly owned by the Detroit Transit Railway, and now owned by the defendant, is street railway property, or railroad property, within the meaning of Act No. 173, p. 236, Pub. Acts 1901; and they concede that if it is railroad property, not merely used by and owned by a railroad, but in the full and general acceptance of that term railroad property, it is not subject to taxation in Detroit, and it only taxable under the provisions of that act. Section 4, Act. No. 173, p. 238, Pub. Acts 1901, makes it the duty of the state board of assessors to make an annual assessment of the property of railroad companies. If the term "railroad companies" be assumed to refer only to companies organized under the general railroad law, the defendant is within the description. It is contended that this railroad must be considered a street railway, for the reasons that it is constructed in a highway, was first built by a company organized under the train railway law, accepted an ordinance from the city authorizing and restricting its construction and operation, and has the right to carry freight and passengers. We are of the opinion that it is fairly inferable from this record that the purpose for which this railway was constructed, and has been and is now operated, is that a steam railroad, to carry freight to and from manufactories and business houses not otherwise accessible by the steam railroads. The ordinance seems to have contemplated such use, and the road has been acquired by a railroad company, and by it leased to another well-known steam railroad company, which is apparently using it in connection with its own road. The fact that it is laid along a highway does not make its use that of a street railway, for steam roads are sometimes granted the use of streets; nor does the fact that it was organized under the train railway act. This was done by the city of Monroe, as appears in the case of *Monroe v. Det., Mon. & Toledo Short Line Ry.*, 143 Mich. 315, 106 N. W. 704; and it has been done by other cities, both within and outside of this state. Sections 4 and 5, Act No. 173, p. 238, Pub. Acts 1901, provide:

"Sec. 4. It shall be the duty of said board to make an annual assessment upon an assessment roll to be prepared by said board, of the property having a situs in this state as hereinafter defined, of railroad companies, union station and depot companies, express companies, doing business within this state, car loaning companies, and refrigerator and fast freight line companies, and all other corporations owning, leasing, running or operating any

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freight, stock, refrigerator, or any other cars, not being exclusively the property of any railroad company paying taxes upon its rolling stock under the provisions of this act, over or upon the line or lines of any railroad or railroads in this state.

"Sec. 5. The term 'property' as used in this act shall be deemed to include all property, real or personal, belonging to the corporation subject to taxation under this act, including the right of way, roadbed, stations, cars, rolling stock, tracks, wagons, horses, office furniture, telegraph or telephone poles, wires, conduits, switchboards, and all other property used in carrying on the business of said corporations or owned by them respectively, and all other real and personal property and all franchises, said franchises not to be directly assessed, but to be taken into consideration in determining the value of the other property."

Under this act the duty of the board is plain, and without doing violence to the language, if not the apparent intent, of the Legislature, we cannot say that any railroad company organized under the provisions of the general railroad law is exempt from taxation under it, whether it acquired its property from manufacturers who manufactured it, or from railway companies organized under some other statute, who purchased, manufactured, or construed it, or whether it operates a track built in a street in a city, under authority granted by a council, or in a country district or highway. A city may withhold a franchise to build and operate a railroad in a street, and it is not impossible that it may make the payment of a local tax a condition; but this would not relieve such a company from its statutory liability to pay taxes. We should not be inclined to hold that calling a road a street railway, or building it in a street, would absolve the railroad company from its liability under Act No. 173, even though it operated a typical street railway. Doubtless, if it purchased one and was permitted to operate it, or if it was organized for the purpose and constructed it, it would be required to perform the conditions of its franchise, though the result should be that it was doubly taxed. See *Monroe v. D., M. & T. Short Line*, *supra*. But this record shows no condition as to taxation in the original franchise. We are therefore of the opinion that the property in question was taxable under Act No. 173 of the Public Acts of 1901, and, being so taxable, it was not subject to local taxation by the plaintiff; for section 13 of said Act No. 173 (this section was amended by Act No. 45 of Public Act of 1903), among other things, provides: "Said taxes shall be in lieu of all taxes for street and local purposes."

We do not discuss the question of the lawfulness of a railroad company's operation of a street railway, because it is unnecessary to decide it.

The judgment is reversed, and a new trial ordered.

HEMAN CONSTRUCTION CO. *v.* WABASH R. CO. *et al.*

(Supreme Court of Missouri, July 2, 1907.)

[104 S. W. Rep. 67.]

**Municipal Corporations—Public Improvements—Special Assessments—Nature.**—While a local assessment for a public improvement is not a tax levied for general revenue purposes, within the constitutional provision requiring uniformity of taxation, it is a tax in the sense that taxes are imposed on individual property receiving benefits from such improvements, different from the general benefit enjoyed by the property owner in common with others.

**Same—Taxing Power.**—Special assessments for local improvements are a constitutional exercise of the state's taxing power.

**Same—Personal Liability.**—A special assessment for a local improvement constitutes a lien only on the property assessed, and cannot be made the basis of a personal judgment against the property owner.

**Same—Property Subject to Assessment—Railroad Right of Way.\***—Under St. Louis Amended City Charter, art. 6, § 14, providing that "all the property fronting on or adjoining an improvement shall be subject to a special assessment therefor," property part of a railroad's right of way contained in a special assessment district is subject to assessment.

Lamm and Fox, JJ., dissenting.

In Banc. Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by the Heman Construction Company against the Wabash Railroad Company and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

*Hickman P. Rodgers, Hamilton Grover, and Chas. W. Bates,* for appellant.

*Henry W. Blodgett,* for respondents.

BURGESS, J. This is a suit on a special tax bill, for street improvement, issued by the city of St. Louis in favor of the plaintiff against real property in said city owned in fee by the defendant railroad company, and upon which the other defendants in the case hold incumbrances by way of deeds of trust, part of which property is used by said defendant railroad company as part of its right of way over which it operates trains. The origin of the special tax bill was the enactment of an ordinance by the municipal assembly of the city of St. Louis providing for the pav-

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\*For the authorities in this series on the question whether railroad property is subject to local assessments, see foot-note appended to *Pittsburgh, etc., R. Co. v. Taber* (Ind.), 23 R. R. R. 753, 46 Am. & Eng. R. Cas., N. S., 753.

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ing of Audubon avenue with vitrified brick, between Taylor and Euclid avenues, in said city. The petition is in the usual form for the enforcement of a special tax bill issued by the city of St. Louis for proportionate cost of construction of a street adjacent to the property of the defendant railroad company. It alleges the incorporation of the various defendants, their interests in the property, which is fully described, the particulars of the tax bill, notice of the issuance thereof, and concludes with prayer for judgment for the amount of the bill, with interest and costs, and that the same be declared a special lien against the real estate described. The amended answer of the defendant railroad company, and of all the other defendants answering, sets forth the defenses: First, general denial; second, that the pretended assessment violates the Constitution and laws of Missouri and of the United States; third, exemption from assessment; fourth, that the land assessed is exempt because a part of a right of way, and therefore a public highway; fifth, exemption from said assessment, and any lien claimed thereunder, as a right, privilege, title, and immunity guarantied under the Constitution and laws of Missouri and of the United States and the charter of the city of St. Louis. It was admitted by counsel that the special tax bill sued on, No. 19,590, dated November 7, 1903, and which was introduced in evidence without objection, was signed by the proper officers of the city of St. Louis, and that said tax bill remains unpaid; that notice of issuance of the said tax bill was duly given to defendants by plaintiff, and that on the 5th day of April, 1904, defendant, the Wabash Railroad Company, was duly served with notice to the effect that, owing to its failure to pay the first installment of said tax bill within the time provided by law, plaintiff, as holder of said bill, had exercised its option and declared the entire bill to be immediately due and collectible. The evidence shows that the main line of the Wabash Railroad, on which its trains pass eastward and westward, runs on and along the length of the strip of land in question, but that a portion of same, fronting 25 feet on Euclid avenue and extending eastwardly between parallel lines at least 250 feet, had no tracks upon it at the time of the assessment and trial. Defendant offered evidence showing that it had paid certain special tax bills arising out of the same street improvements, and which were assessed against its grounds fronting Euclid and Audubon avenues, laid off and platted as lots, and upon which no railroad tracks were laid, and which was not used for railroad purposes. The cause was tried without a jury. At the conclusion of the evidence, plaintiff asked the court to declare the law as follows: "The court, sitting as a jury, declares the law to be that the special tax bill offered and received in evidence makes a prima facie case for plaintiff, and that, it being admitted that defendants are the owners in fee of the property described in said tax bill, the mere fact that railroad tracks are laid on portions of said ground and constitute a part of the main line of the Wabash Railway Company between St. Louis and Kansas City is no de-

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fense to plaintiff's cause of action;" which requested declaration of law the court refused to give, and plaintiff duly excepted. At the instance of defendants, the court declared the law as follows: "The court gives, at the request of defendants, the instruction that, under the pleadings and all evidence, plaintiff is not entitled to recover;" to the giving of which declaration of law plaintiff duly excepted. At the same term of court judgment was rendered against plaintiff and in favor of defendants for costs, from which judgment plaintiff, after filing an unsuccessful motion for a new trial, appealed to this court. Section 5, art. 10, Const. Mo., provides: "All railroad corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on the real and personal property owned or used by them, and on their gross earnings, their net earnings, their franchises and their capital stock."

While a distinction is made between local assessments and taxes levied for general revenue purposes, in that an assessment for a local improvement is not a tax within the meaning of the constitutional provision requiring uniformity of taxation, it is in a sense a tax, not, however, for the purpose of sustaining the government, but imposed upon individual property upon the theory that such property receives a special benefit different from the general one which the owner enjoys in common with others; in other words, an assessment for benefits. That portion of section 14, art. 6, of the amended charter of the city of St. Louis, under which the assessment in this case was made, is as follows: "Special taxes for the improvements of streets, avenues and public highways shall be levied and assessed as follows: The total cost of grading and preparing the roadbed for the superstructure, placing foundation, curbing, guttering, roadway paving and crosswalks for the street embraced in the improvement, including all intersections of streets and alleys, shall be ascertained and one-fourth thereof shall be levied and assessed upon all the property fronting upon or adjoining the improvement, in the proportion that the frontage of each lot so fronting or adjoining bears to the total aggregate of frontage of all lots or parcels of ground fronting upon or adjoining the improvement, and the remaining three-fourths of the cost so ascertained shall be levied and assessed as a special tax upon all the property in the district to be defined and bounded as hereinafter provided, in the proportion that the area of each lot or parcel of ground or the part of such parcel of ground lying within the district bears to the total area of the district, exclusive of streets and alleys. The districts herein referred to shall be established as follows: A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter provided, namely: If the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved. If the line drawn midway as above



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described would divide any lot lengthwise or approximately lengthwise, and the average distance from the midway line drawn to the nearer boundary line of the lot is less than twenty-five feet, the district line shall in such case diverge to and follow the said nearer boundary line. If there is no parallel or converging street on either side of the street to be improved, the district line shall be drawn three hundred feet from and parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be improved and at the average distance of the opposite district line so fixed and located. Provided, that if any property in a district established as herein provided is not liable to special assessment, the city shall pay the proportion of cost of the improvement which would have been assessed against such property. All of the property in the lots, blocks or tracts of land lying between the street to be improved and the district lines established as above specified, shall constitute the district aforesaid." It will be noted that this section expressly provides that "all the property" in the district to be defined and bounded as therein provided shall be subject to special taxes for the improvements of streets, avenues, and public highways. It exempts no property from its operation, and, if the defendant railway company is exempt from the taxes sued for, the burden rests upon it to show why it is so exempt.

Under the law of this state, as declared by the higher courts, it is well settled that special assessments for local improvements are a constitutional exercise of the taxing power (*Garrett v. St. Louis*, 25 Mo. 505, 69 Am. Dec. 475; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492; s. c., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879), and that "it is within the power of the Legislature of the state to create special taxing districts, and to charge the cost of local improvements, in whole or in part, upon the property in said district, either according to valuation or superficial area of frontage" (*Webster v. Fargo*, 181 U. S. 394, 21 Sup. Ct. 623, 645, 45 L. Ed. 912; *Prior v. Construction Co.*, 170 Mo. 439, 71 S. W. 205; *Asphalt Paving Co. v. French*, *supra*; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276). "It has also been ruled that the provisions of article 10 of the Constitution of Missouri, in regard to taxation, are applicable only to taxation in the ordinary acceptance of the term, and are inapplicable to these special assessments" (*Farrar v. St. Louis*, 80 Mo. 379, and cases cited), and the same rule is held as to sections 3, 4 and 11, as to the uniformity of taxation (*Farrar v. City of St. Louis*, *supra*; *City of St. Joseph, to Use, v. Owen*, 110 Mo. 445, 19 S. W. 713).

It is insisted by defendant that the tax bill sued on has no life except as a lien upon the specific property described therein, and that unless the lien sought to be enforced can attach to the

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specific property described in the petition and tax bill there can be no recovery, because there can be no personal judgment. In this state there is no personal liability of the property owner for special assessments, hence special taxes therefor are a charge against the property only. But it is contended that in the case at bar the lien would have to be enforced against a fractional part of a railroad right of way, which would be against public policy, and could not be done unless authorized by the Legislature in language not to be doubted. Such is the doctrine announced in the case of *Sweany v. Kansas City Ry. Co.*, 54 Mo. App. 265, upon which defendant relies as sustaining its position. This decision is bottomed upon *Dunn v. Railroad*, 24 Mo. 493; *Abercrombie v. Ely*, 60 Mo. 23; *Schulenburg v. Railroad*, 67 Mo. 442; *Knapp v. Railroad*, 74 Mo. 378; and *Skrainka v. Rohan*, 18 Mo. App. 344—with respect to which it is said: "These were cases mainly for the enforcement of mechanics' liens against railroad bridges, depot buildings, and the like, based on the general provision of the mechanic's lien law allowing such liens for labor and materials furnished for all buildings, erections, improvements, etc. It was admitted that the erections of the railroad might come under the terms 'buildings' or 'improvements' of the mechanic's lien law, but yet it was said to be against the policy of the law to permit the enforcement of a lien against a detached portion of a railroad. The railroad is declared public in its nature; that if a portion of its right of way was thus allowed to be taken its capacity for serving the public would be destroyed; hence it was said 'that it is better to suffer a mischief which is peculiar to one than an inconvenience which may prejudice many.' *Dunn v. Railroad*, 24 Mo. 495." Practically the same rule is announced in *McCutcheon v. Pac. Ry. Co.*, 72 Mo. App. 271.

Where words of general description are used in reference to taxation, such as "all property," they include everything of that kind not expressly, or by necessary implication, excepted. *State ex rel. v. Keokuk & Western R. R. Co.*, 153 Mo. 157, 54 S. W. 559, 77 Am. St. Rep. 704. So that there can be no doubt that the words "all property," as used in the city charter, include all railroad property; and railroad rights of way being private real property, they are, unless specially exempted, subject to assessment for local improvement under the terms of section 14 of article 6 of the amended charter of the city of St. Louis.

In the case of *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St. 159, the question was, whether lands which had been condemned for railroad purposes before the making of a street improvement; upon which lands the railroad track was built after the improvement was completed, and which lands crossed the improved street at right angles, were liable to assessment for the improvement. It was held that the assessment was valid. The court, after stating that railroad tracks are liable for general taxes, said: "If railroad tracks are taxable for general purposes, it is difficult to perceive why they should not be subject

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also to special taxes or assessments. The company, to advance its own interests, has seen fit to appropriate to its use ground within the corporate limits of the city of Toledo, and over which that city had the power of making assessments to defray the expenses of local improvements, and why should not the company be held to have taken it *cum onere*? A citizen would scarcely claim exemption because he had devoted his lot to uses which the improvement could not in any way advance, and we see no good reason why a railroad company should be permitted to do so. \* \* \* But it is said that assessments, as distinguished from general taxation, rest solely upon the idea of equivalents, a compensation proportioned to the special benefits derived from the improvements, and that, in the case at bar, the railroad company is not, and in the nature of things cannot be, benefited by the improvement. It is quite true that the right to impose such special taxes is based upon a presumed equivalent; but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. \* \* \* No general rule, therefore, could be laid down which would do equal and exact justice to all. The Legislature have not attempted so vain a thing, but have prescribed two different modes in which the assessment may be made, and left the city authorities free to adopt either. The mode adopted by the council becomes the statutory equivalent for the benefits conferred, although in fact the burden imposed may greatly preponderate. In such case, if no fraud intervene, and the assessment does not substantially exhaust the owner's interest in the land, his remedy would seem to be to procure, by a timely appeal to the city authorities, a reduction of the special assessment and its imposition, in whole or in part, upon the public at large." The same rule is announced in the case of *Peru & Indianapolis R. R. Co. v. Hanna et al.*, 68 Ind. 562.

In the case of *City of Chicago v. Baer*, 41 Ill. 306, it is held that a street railway was subject to assessment for the improvement of the street upon which it was located.

In *Chicago City Railway Co. v. City of Chicago*, 90 Ill. 573, 32 Am. Rep. 54, it was held that the right of way, right of occupancy, franchise and interest in a street railway company having a track in a street under a charter of the Legislature and under a contract with the city council is a property, and as such is liable to be assessed for benefits in the widening of the street upon which it runs its cars the same as any other property benefited by the proposed improvement. To the same effect, *Cicero Ry. Co. v. City of Chicago*, 176 Ill. 501, 52 N. E. 866.

In *Atchison, T. & S. F. R. R. Co. v. Peterson et al.*, 51 Pac. 290, 58 Kan. 818, it is held that the right of way and switchyards of a railroad company are liable for an assessment to contribute to the expense of local improvements such as sewers and the like. The same rule is announced in *Illinois Central R. R. Co. v. East Lake Fork Drainage Commissioners*, 129 Ill. 417, 21 N. E. 925;

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Wabash, etc., Ry. Co. v. East Lake Fork Drainage Commissioners, 134 Ill. 389, 25 N. E. 781, 10 L. R. A. 285.

It was held in the case of Louisville & N. R. R. Co. v. Barber Asphalt Paving Co., 76 S. W. 1097, 116 Ky. 856, that the right of way of the railroad company is liable to assessment for a street improvement. See, also, Figg v. Louisville & N. R. R. Co., 75 S. W. 269, 116 Ky. 135; Orth v. B. B. Pork & Co., 79 S. W. 206, 117 Ky. 779; Commissioners of Chatham County v. Seaboard Air Line, 133 N. C. 216, 45 S. E. 566; Minneapolis, etc., Ry. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103.

In *City of Ludlow v. Trustees of Cincinnati Southern Ry. Co.*, 78 Ky. 357, suit was brought by the contractor, J. W. Rich, against the appellant and the trustee of the Cincinnati Southern Railway Company to recover an assessment made by the city upon a lot belonging to the trustees and abutting on the improved street. The trial court held that the lot was necessary for the operation and maintenance of the railway, and refused to subject it to the payment of the claim, and rendered judgment against the city. Upon appeal, the correctness of that ruling was questioned. The court said: "While assessments of this character, as distinguished from general taxation, rest upon the basis of benefits or presumable benefits to the property assessed, it is not essential to their validity that actual enhancement in value, or other benefit to the owner, shall be shown. The passage of the ordinances by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement, and of the question of benefit to the owners of abutting property. *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St. 164. Absolute equality in the distribution of such burdens cannot be attained. An approximation to equality is all that is possible, but in reaching this point the present or prospective use of the property cannot enter into the calculation." It was held by the court in that case that the city of Ludlow having levied an assessment upon all real estate lying upon a certain street within its limits, for the purpose of improving the street, a lot upon the street owned by the appellee, the Cincinnati Southern Railway Company, was subject to the assessment, and that the fact that the lot was the property of a railway company, and used for railroad purposes, furnished no more reason why it should be exempted from an assessment than if it belonged to a natural person.

In *Louisville, etc., Ry. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819, it is said: "There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of

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forecast and estimate. In its general aspects at least it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district, the municipality, and to disguise, rather than to answer, the theoretic doubt. It is dangerous to tie down Legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution. Particularly it is important for this court to avoid extracting from the very general language of the fourteenth amendment a system of delusive exactness in order to destroy methods of taxation which were well known when the amendment was adopted, and which it is safe that no one then supposed would be disturbed. \* \* \* That apart from the specific use to which this land is devoted land in a good-sized city generally will get a benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions which, as we have already implied, a Legislature is warranted in adopting. But if so we are of opinion that the Legislature is warranted in going one step further and saying that on the question of benefit the land shall be considered simply in its general relations and apart from its particular use. On the question of benefits, the present use is simply a prognostic, and the plea a prophecy. If an occupant could not escape by professing his desire for solitude and silence, the Legislature may make a similar desire fortified by structures equally ineffective. It may say that it is enough that the land could be turned to purposes for which the paving would increase its value. Indeed, it is apparent that the prophecy in the answer cannot be regarded as absolute, even while the present use of the land continues; for no one can say that changes might not make a station desirable at this point, in which case the advantages of a paved street could not be denied. We are not called upon to say that we think the assessment fair. But we are compelled to declare that it does not go beyond the bounds set by the fourteenth amendment of the Constitution of the United States."

Judge Elliott in his work on Railroads, § 786, says: "There is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessment. The question has been discussed in a great number of instances, and different conclusions reached in apparently similar cases. The latest authorities on the subject, however, recognize what we believe to be the true rule, and that is, that when the right of way receives a benefit from the improvements for which the assessment is levied, and there is no statute exempting the railroad company from local assessments in clear and unequivocal terms, it is subject to assessment."

After discussing the adjudications which hold that the right of way of a railroad company may be assessed for local improvements, Gray, in his work on Limitation of Taxing Power and Public Indebtedness, § 1913, says: "On the other side are several respectable authorities. If they be closely examined, however, it will be found that the question was one of fact in the



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particular cases." The author then cites *City of Bridgeport v. New York, etc., Ry. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Detroit, etc., Ry. Co. v. City of Grand Rapids*, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793, 58 Am. St. Rep. 466; *Philadelphia v. Philadelphia, etc., Ry. Co.*, 33 Pa. 43; *Junction Ry. Co. v. Philadelphia*, 88 Pa. 424; *Borough of Mt. Pleasant v. Baltimore & Ohio Ry. Co.*, 138 Pa. 365, 20 Atl. 1052, 11 L. R. A. 520; *Allegheny City v. West Penna. Ry. Co.*, 138 Pa. 375, 21 Atl. 763; *Chicago, etc., Ry. Co. v. City of Ottumwa*, 112 Iowa, 300, 83 N. W. 1074, 51 L. R. A. 763; *Chicago, etc., Ry. Co. v. City of Milwaukee*, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249, *New Jersey, etc., Ry. Co. v. City of Elizabeth*, 37 N. J. Law, 330; *Paterson, etc., Ry. Co. v. City of Passaic*, 54 N. J. Law, 340, 23 Atl. 945; *City of Boston v. Boston, etc., Ry. Co.*, 170 Mass. 95, 49 N. E. 95. In each of these cases the question was one of fact; that is, absence of benefit to the property against which the assessment was made.

Nor is the right of way of defendant exempt from local assessment for benefits upon the ground that by section 14, art. 12, of the Constitution of Missouri, and sections 1127 and 1128, Rev. St. 1899 [Ann. St. 1906, p. 972], railways are declared to be public highways. In passing upon this question in *City, to Use, v. Eddy*, 123 Mo. 546, 27 S. W. 471, Gantt, P. J., speaking for the court, said: "The declaration in the Constitution that railways in this state are 'public highways,' in the connection in which it appears, obviously was not intended to throw them open as thoroughfares for pedestrians. Its object was to lay a foundation for certain kinds of legislative regulation of railways, but not to change the nature of the railroad property, or to divert it from the general purpose for which it was designed. Nor is it in any sense a warrant to use the cars of the railway company without the payment of reasonable tolls and in defiance of the management and regulation of the company. \* \* \* Neither is the position of defendants true, that, because they are, by the Constitution, 'public highways,' all of their property is exempt from special assessment, just as a public state or county road would be. The railroad of the company is not in this extreme sense the work of the state. The roadbed and the depot grounds are not public property managed by the company as an agent of the state. On the contrary, the company is a private corporation; its stock is the private property of its stockholders, who, as such own its property. Because its function is to serve the public as a public carrier the state has invested it with the power of eminent domain and reserved to itself the power of visitation and regulation to protect the public so as to secure reasonable fares and tariffs and proper police regulation, but the stockholders, not the state, pay for its property and easements, and it becomes their property. The state taxes all of its property for general governmental purposes, so that, while for many beneficial purposes it is a 'highway,' it is misleading to speak of it as a highway in the strict sense of exemption



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from taxation, because this power is reserved to the state, and is constantly exercised over all of its property. The courts have differed widely in their opinions on this subject, even as to taxing the right of way for local improvements, but the case in hand does not call for an expression on the last proposition."

If the right of way is taxable for general purposes, it is somewhat difficult to see why it may not be assessed for local improvements from which it is presumed to derive some special benefits not enjoyed by the general public. If an improvement is to be made, the benefit of which is local, the property benefited thereby should, upon every principle of justice, bear the burden. While the few ought not to be taxed for the benefit of the whole, neither should the whole be taxed for the benefit of the few. General taxation for a mere local purpose is manifestly unjust. It imposes a burden upon those not benefited by the improvement. The ordinance having expressly imposed the burden upon "all property" in the district specially benefited by the improvement, without exempting any, the question is whether an exemption ought to be implied by the courts in favor of the railroad right of way. We think not.

Our conclusion is that, according to the decided weight of authority and the better reason, the right of way of the defendant was properly assessed for local improvements, and that the declaration of law asked by plaintiff should have been given, and the declaration of law given at the instance of defendant refused. It follows that in so far as the case of *Sweaney v. Kansas City Railway Co.*, 54 Mo. App. 265, is taken as authority for the contention that the right of way of the defendant company cannot be charged with the lien of the special tax bill sued on for street improvements made under the charter of the city of St. Louis, it is overruled.

As to the proposition urged against this lien, that the roadbed or right of way of the defendant, or a part thereof, could not be sold under execution to satisfy any judgment which may be rendered in favor of plaintiff in this case, it is not necessary for us to express an opinion at this time. What we do hold is that, under the charter and ordinance, the tax bill sued on in this case is a lien against that part of the right of way of the defendant company described in the tax bill. We do not feel called upon to determine how such judgment can be enforced, but it is probable that counsel will be able, if necessary, to accomplish such result. As a general rule, "where there is a right, there is a remedy" (2 Dillon's Municipal Corporations [4th Ed.] § 822; *McInerney v. Reed*, 23 Iowa, 410; *Lima v. L. Cem. Association*, 42 Ohio St. 128, 51 Am. Rep. 809; *New York v. Colgate*, 12 N. Y. 140), and this case, we think, forms no exception to that rule. Our conclusion is that the judgment should be reversed and the cause remanded. It is so ordered.

GANTT, C. J., and VALLIANT, GRAVES, and WOODSON, JJ., concur. LAMM and FOX, JJ., dissent.

HARTSHORN *v.* CHICAGO GREAT WESTERN RY. CO.

(Supreme Court of Iowa, Nov. 19, 1907.)

[113 N. W. Rep. 840.]

**Railroads—Private Crossings—Agreements—Construction.**—A railway company, pending proceedings to condemn land for a right of way through a farm, agreed in consideration of a reduction of damages to give the owner an open crossing where the right of way intersected a 220 acre pasture. Held to contemplate an open crossing suitable for the passage of stock between the separate parts of the farm.

**Same.\***—A railway company agreeing to give an owner of a farm an open crossing must comply therewith, unless compliance will unnecessarily interfere with the safe operation of the railroad or with the public necessities of rapid transportation.

**Same.\***—Though a railway company cannot arbitrarily change a private crossing constructed pursuant to an agreement with an owner of a farm, it may make such changes therein as are essential to prevent interference with the safe operation of the railroad and to render the crossing adequate.

**Same.**—A railway company pending proceedings to condemn land for a right of way through a farm agreed in consideration of a reduction of damages to give the owner an open crossing at such place as he might suggest. A crossing was established at a point mutually agreed on, but it interfered with the safe operation of the railroad. It was practicable to establish a crossing at another point. Held, in the absence of evidence, it would not be presumed that the expense of establishing a new crossing would be excessive, and the company must take the initiative and demand that the owner select a reasonable place for a new crossing, and, until it should do so, it should be enjoined from closing the existing crossing.

Appeal from District Court, Wright County; J. H. Richard, Judge.

Action to enjoin the defendant from closing a private railway crossing. The petition was dismissed, and plaintiff appeals. Reversed.

*Peterson & Knapp*, for appellant.

*Healy & Healy* and *Birdsall & Birdsall*, for appellee.

LADD, J. Plaintiff is the owner of the south half and the northwest quarter of section 35, township 92 north of range 24 west of fifth P. M. His improvements are along the highway on the south line of the section. In 1901 the defendant condemned a right of way along the north line of the south half section sep-

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\*See note appended to *Costello v. Grand Trunk Ry. Co.* (N. H.), 19 Am. & Eng. R. Cas., N. S., 386.

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arating therefrom the northwest quarter, to which plaintiff now has no access, save across the defendant's track. Pending the trial in the condemnation proceedings, the defendant expressly agreed to give the plaintiff "an open crossing at such reasonable place he may suggest, with cattle guards." The law required it to furnish an adequate crossing at such reasonable place as the owner might select, so that the only significance of the stipulation is that the crossing should be open. The character of the use is not defined, nor was this necessary, as the expression "open crossing," when applied to railroads, has a well-understood meaning, and the use to be made of it necessarily depends somewhat upon the character of the land on each side of the track and the purposes to which the owner put it. The only natural inference is that such use is to be made of the crossing as the exigencies of carrying on the ordinary pursuits of agriculture render necessary. Here the right of way intersected a pasture of some 220 acres, and the parties to the agreement must have contemplated an open crossing suitable for the passage of a large amount of stock between the separated portions of the farm. If there were any doubt on this score, the circumstances under which the agreement was entered into, as alleged in the petition and proven, without serious conflict in the evidence, demonstrate that such was the design. Having enjoyed the advantage of the stipulation, by way of reduction of damages, the defendant should be held to performance, unless conditions are such as will relieve it from its obligation. The parties agreed upon the location of the crossing, and defendant made the necessary improvements therefor. It was maintained for about a year, when the company fenced it on both sides and put in gates.

In justification for so doing, it contends (1) that an open crossing at such place is a menace and dangerous to the transportation of property and passengers over its line of road; and (2) that an unreasonable expense would be essential to obviate this peril, and enable it to continue the open crossing. It is no answer to say that the company should have realized all this when making the promise, for the public is too deeply concerned in the safe operation of the railway and the protection of life and property to tolerate the continuance unnecessarily of a known peril to either. Nor should improper agreements in the interest of private convenience or to avoid outlay of money be allowed to unduly interfere with the public necessities of rapid transportation. Experience often demonstrates error in plans for the future, no matter how carefully considered, and when these are discovered the door for adequate correction, when the public is so vitally concerned, ought not to be closed. As pointed out in *Scrimper v. Railway*, 115 Iowa, 35, 82 N. W. 916, 87 N. W. 731, the railway company cannot be permitted arbitrarily to change a crossing, but when, owing to the situation and use of that established, it is found, on the one hand, to be inadequate, or, on the other, unduly to interfere with the safe operation of the railroad, these objections may be obviated by such change or changes as are essential to accomplish

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that object. *State v. Railway*, 99 Iowa, 565, 68 N. W. 815; *Scrimper v. Railway*, *supra*. If, then, the place selected by the parties for this open crossing has proven with respect to the use made of it to be unsafe, another more satisfactory for the purposes contemplated should be selected in its stead. That now existing is where the cut extending east 3,100 feet and the fill running west 1,900 feet meet, so that the crossing is at grade, and the topography of the farm is such as to render it doubtful whether a more suitable location could be selected for a surface crossing. The road is straight, so that there is an unobstructed view for miles each way, but, owing to the cut, engineers coming from the east experience difficulty in detecting objects on the crossing until within from 100 to 300 feet. The evidence also indicated that the cattle often gather on the track, so that trains are compelled to slow up or stop until they scatter. Moreover, the evidence tended to show that an engine is likely to be derailed if it comes in collision with cattle, especially when lying on the track where they may go when having free access to the right of way. Some of plaintiff's cattle were killed, though after the gates had been put in and left open. While the consequences thus far had not been serious, the situation appears to be such that, in the interest of rapid transportation and the safe operation of trains, an open crossing at that place ought to be obviated, especially in view of the uses originally contemplated by both parties.

Counsel for appellee charge the plaintiff with responsibility for the mistake, and argue that the company is still willing to maintain an open crossing at a reasonable place. The record discloses, however, that the location was fixed upon by mutual consent, and that the defendant, without offering to establish another, at the end of the year and without plaintiff's consent, closed it with a fence and put in gates. The fault, therefore, was that of the defendant for Hartshorn was content with the crossing given him. If the company became dissatisfied, it was its duty to take the initiative in the selection of another location. For three years it has done nothing of the kind, and the fair inference is that it had no such purpose, but is undertaking to effect a change in the character of the crossing in spite of its agreement and against plaintiff's protest. Authorities holding that contracts of common carriers inconsistent with their public duty cannot be enforced have no application, for the evidence indicates that it is practicable to establish an open overhead crossing at some distance east of this or an under crossing a short distance west, and, in the absence of any evidence on the subject, it is not to be presumed that the expense in so doing would be excessive. See *Herrstrom v. Railway*, 129 Iowa, 507, 105 N. W. 436. *Truesdale v. Jenson*, 91 Iowa, 314, 59 N. W. 47, is not in point, for here the parties have determined for themselves that the crossing shall be open, and the controversy is whether the defendant shall bide its contract. We have a case, then, where the existing crossing, owing to the purpose for which it is used, is not at a reasonable location, where the improvements of the landowner are not such that his rights will

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be interfered with by a change, and where there are other locations at either of which a crossing such as has been contracted may be safely maintained. The remedy in such a case is simple. Let the company demand that the landowner select another location, which under the law must be reasonable or possibly the parties may agree thereon. If there are differences as to where the crossing shall be placed, the railroad commissioners may be able to adjust them. *State v. Railway*, 85 Iowa, 516, 52 N. W. 490. But, until the defendant has established another crossing such as it has promised to maintain, it is in no position, save in an emergency which does not exist, to close that already established. Its continuance is not fraught with great danger. The evidence shows that, with the proper exercise of care, the safety of travelers and property need not be jeopardized. During the time it was open no cattle were run down, and possibly but for the existence of the fence and a defective cattle guard none subsequently would have escaped into the right of way. Our conclusion is that defendant should have been enjoined from closing the crossing, but with leave to apply for a dissolution of the writ or a modification of the decree upon the establishment of another open crossing at such reasonable place as shall be selected, or the cause after granting such relief might have been continued for that purpose.

The decree is reversed, and the cause remanded for an entry in harmony with this opinion.

Reversed.

GEORGIA RY. & ELECTRIC CO. v. TOWN OF OAKLAND CITY *et al.*

(Supreme Court of Georgia, Nov. 16, 1907.)

[59 S. E. Rep. 296.]

**Injunction—Restraining Criminal Proceedings—Enforcement of Ordinance.**—The general rule is that a court of equity has no jurisdiction to enjoin criminal prosecutions; and this rule is applicable to proceedings to punish for violations of municipal ordinances, which are quasi criminal in their nature. The cases in which proceedings to enforce such ordinances will be enjoined are exceptional in character.

**Same.**—Where a municipal corporation passed an ordinance requiring street cars on a public street extending through the town to be stopped at three designated points for the reception of passengers, in addition to those where the company itself was accustomed to stop its cars for that purpose (except one), and fixing a penalty for disobedience thereof, injunction will not be granted to restrain the enforcement of the ordinance by prosecution, or to determine the question of its validity or its reasonableness or unreasonableness.

**Same.**—The case arose and was decided before the passage of the act of August 23, 1907 (Acts 1907, p. 72), enlarging the powers of the Railroad Commission of the state; and the present decision is made without reference to that act.

(Syllabus by the Court.)

**Georgia Ry. & Elec. Co. v. Oakland City**

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Bill by the Georgia Railway & Electric Company against the town of Oakland City and others. Judgment for defendants, and plaintiff brings error. Affirmed.

*Rosser & Brandon* and *W. T. Colquitt*, for plaintiff in error.

*J. F. Golightly*, *M. L. Hathcock*, and *Walter McElreath*, for defendants in error.

LUMPKIN, J. The Georgia Railway & Electric Company operates a line of street and suburban railway which passes through the town of Oakland City; its tracks being in a public street of the town known as the "Chert Road." It has been accustomed to stop its cars at certain points in the corporate limits to receive and discharge passengers. The municipal authorities passed an ordinance requiring street cars traversing the street named to be stopped at the points already in use (except one) and also at three additional points to receive passengers who might there seek to board such cars, and signal or give notice of their intention to do so. The company filed an equitable petition, seeking to enjoin the enforcement of the ordinance by frequent arrests and trials of its employees for violating it. The petition alleged that the ordinance was void on the grounds that it was unconstitutional, that the defendant had no power under its charter to enact the ordinance, and that such ordinance was unreasonable. It was claimed that to allow such arrests and prosecutions would cause a multiplicity of cases, would interfere with the running of its cars and schedules, and disarrange the schedule established by the company. The defendant denied the invalidity or unreasonableness of the ordinance. The evidence was conflicting as to the necessity or convenience of making the stops at the fixed places. The injunction was refused, and the plaintiff excepted.

Without determining whether the ordinance complained of is valid or not, or whether it is in whole or in part unreasonable, the facts of this case are not such as to require the reversal of the judgment refusing an injunction. The general rule is that equity has no jurisdiction in criminal matters. Its jurisdiction is for the protection of property and property rights and franchises. Certain courts of law are invested with power to try persons accused of the violation of the criminal laws. The two are separate; and the general rule is that a court of equity will neither aid nor interfere with the administration of the criminal laws in the courts established by the state and invested with criminal jurisdiction. The rule has often been applied both to criminal proceedings under the state laws and quasi criminal proceedings under municipal laws. An additional reason for it might be suggested in respect to the state, on the ground that it might be an attempt to restrain the sovereign power in the name of which criminal proceedings are conducted. The state is not suable at all without its consent, save by another state in the Supreme Court of the United States,



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while municipalities have not the same immunity from litigation. While this question as to the parties to the suit may furnish some difference, yet the principle of the general want of jurisdiction in equity to interfere with the administration of criminal laws has long been treated as applicable to the laws of the state and also to the quasi criminal ordinances of a municipal corporation. In *re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402. Many efforts have been made to establish various exceptions to the general rule; but, if exceptions have been allowed, it was only where they were held to clearly involve subjects of equitable cognizance, and where equitable interference was necessary. Every arrest and prosecution is likely to work injury to the character and business of the defendant; and many crimes relate to acts affecting property. Still a court of equity cannot undertake, merely on account of some possible incidental injury, to practically stop a court of competent jurisdiction from trying one accused of an offense. If it did so, a very large part of criminal prosecutions and the due enforcement of criminal laws would be stopped by defendants invoking the aid of equity, on the ground that their persons, character, business, or property would be injured by permitting the prosecution to proceed, and that the law on which it is grounded is invalid, or does not apply to the defendant; in other words, that he is not guilty. See *Davis v. American Society*, 75 N. Y. 362.

In England, though there has been some conflict in the decisions, it seems to be the rule that a Court of Chancery may enjoin a party to a suit already pending before it from proceedings by prosecution to try the same right which is in issue in that court. In some of the United States the rule of non-interference has been announced absolutely and as if almost without exception. *Crighton v. Dahmer*, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, 35 Am. St. Rep. 666. That there are cases, however, which form exceptions to the rule has been recognized. In the case of *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, Mr. Justice Field, in his concurring opinion, said: "In many cases proceedings, criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity." The principle on which such cases usually rest is that the action sought to be enjoined is in the nature of a fraudulent use or an abuse of legal proceedings, where the rights of the applicant for injunction are clear, and the proceedings are obviously nothing but a circuitous method of depriving him of his property or property rights, or where municipal authorities, under the pretense of seeking the good of the portion of society intrusted to their supervision, are, in fact, attacking the vested property rights of individuals or corporations.

It has been often sought to obtain an injunction on the general ground of multiplicity of suits, but these efforts have generally been denied. *Poyer v. Village of Des Plaines*, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494. If mere multiplicity of prosecutions alone, without other grounds for equitable interference for

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the protection of property or franchises, would require injunction against criminal proceedings, every person who might be prosecuted for conducting a business without a license, or for doing business on Sunday, or for violating a municipal ordinance against keeping goods on the streets, or in many other cases which might be suggested, could protect himself with an injunction, so as to continue to violate the law while the single case in equity was being tried and appealed from court to court. In some cases, where there was a clear right which was being invaded under an invalid ordinance, multiplicity of prosecutions has been considered as adding force to the plaintiff's position. In one or two of them injunction has been granted, not against proceeding altogether, but only against the excessive multiplying of cases under the ordinance. In *Port of Mobile v. Louisville & Nashville R. Co.*, 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342, it was held that where a city attempted unlawfully to destroy a franchise which had been conferred upon a railroad company, and which the municipality had no right to revoke, by means of a quasi criminal ordinance, injunction would be granted. In the opinion Somerville, J., said: "There is no sort of pretense that it was a mere police regulation. \* \* \* The purpose of the defendant corporation is obviously to destroy the franchise which it has conferred, and the ordinance under consideration, having this effect, if executed, must be held to be void." For other authorities outside of this state on the subject, see 1 High on Injunctions (4th Ed.) § 68; 2 Id., § 1244; note to *Creighton v. Dahmer*, 21 L. R. A. 84; note to the same case in 35 Am. St. 670 et seq., 16 Am. & Eng. Encyc. L. 370-372.

We now turn to the authorities in this state. In *Gault v. Wallis*, 53 Ga. 675, the general rule was applied in a case where a justice of the peace discharged a prisoner and issued a cost *fi. fa.* against the prosecutor. It was alleged that this action was wrongful, and that the justice was insolvent. The rule was again announced broadly in *Phillips v. Mayor, etc., of Stone Mountain*, 61 Ga. 387. There an ordinance required the doors of all retail liquor stores to be closed during the continuance of divine worship by any denomination of Christian people within the corporate limits. It was alleged that the ordinance was void, and restricted the complainants' business; that two of the complainants had already been fined and had carried their cases to the superior court by writ of certiorari; and that it was the intention of the municipal authorities to strictly enforce the provisions of the ordinance. The injunction was denied. In *Garrison v. City of Atlanta*, 68 Ga. 64, injunction was denied to restrain the enforcement by fine or imprisonment of an ordinance prohibiting the allowing of cattle to run at large on the streets. In *Pope v. Mayor, etc., of Savannah*, 74 Ga. 365, shelves were built in front of a store, complainant claiming the right to do so, An ordinance prohibiting the obstruction of streets and sidewalks. The city threatened to have the complainant arrested and fined for every day the shelves were allowed to remain. Insolvency

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of the city was alleged. Injunction was denied. See, also, *Bainbridge v. Reynolds*, 111 Ga. 758, 36 S. E. 935. In *Salter v. City of Columbus*, 125 Ga. 96, 54 S. E. 74, a resident of Alabama delivered beer by wagons in Columbus. Injunction was sought to prevent frequent threatened arrest under an ordinance requiring a license to be obtained by dealers in the city; but the injunction was denied. In *City of Atlanta v. Gate City Gaslight Company*, 71 Ga. 106, somewhat broad language was used; but in the opinion it was declared that, where it was manifest that prosecution and arrest were threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly by law (a state law which the city had no right to disregard), injunction was a proper remedy to prevent injury to the party menaced. This ruling was repeated in *Georgia Railroad & Banking Co. v. City of Atlanta*, 118 Ga. 486, 45 S. E. 256, where the city was enjoined from preventing the railroad company, by threatened arrest and prosecution of its employees, from fencing a strip of land forming a part of its right of way, and to which the city sought to lay claim as a street. In *Paulk v. Mayor, etc., of Sycamore*, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128, an ordinance making penal the sale or keeping for sale of liquor in the town of Sycamore was sought to be enjoined on the ground that it was void, and had also been repealed, and that threatened prosecutions would harass and jeopardize the personal liberty and interfere with the enjoyment of the civil rights of the complainant and his business, and cause irreparable damage. Injunction was denied. See, also, *O'Brien v. Harris*, 105 Ga. 732, 31 S. E. 745. The case of *City of Atlanta v. Gate City Gaslight Co.*, *supra*, was discussed and explained. This ruling was repeated in *Mayor, etc., of Moultrie v. Patterson*, 109 Ga. 370, 34 S. E. 600, where the ordinance involved was one making it penal to sell beef, pork, fish, etc., within the city limits, except in the city market. The Gate City Gaslight Case was again referred to as resting on the right of equity to interfere where it was evident that private property and civil rights were being invaded by means of the use of such ordinances, and that injunction was necessary in order to protect a right which was in jeopardy, and which could not otherwise be fully protected. In *Hasbrouck v. Bondurant & McKinnon*, 127 Ga. 220, 56 S. E. 241, the facts involved do not appear from the headnotes. Two parties were involved in a controversy over the right to dig and haul sand from a sandbank. One of them filed a petition in equity against the other; and pending the case he sought to enforce his claim by suing out, and threatening to continue to sue out, criminal warrants. This was an effort to misuse criminal process for the purpose of acquiring or establishing a property right; and was also during the pendency of the equitable proceeding to determine the right. Injunction was granted.

The rule that a court of equity will not ordinarily enjoin a criminal act considered merely as such, but will enjoin a trespass working irreparable damage to property, although the act may also

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be the subject of punishment, is often invoked to authorize an injunction against a criminal prosecution. But an individual act causing irreparable damage is one thing; the prosecution of a person charged with an offense, in the courts provided for the trial of such proceeding, is a different thing. Without reciting the evidence in the present case, a comparison of it with the principles above enunciated will show that, whether the ordinance was reasonable or not, the injunction prayed was properly denied. There was no effort to take away property or property rights, or to destroy or substantially impair a franchise. The ordinance was a police regulation of travel in the streets of a municipality. It was not shown that any irreparable injury would result; but, at most, a small interference with the schedules which the company desired to maintain, while the cases made against its employees proceeded to trial when the validity of the ordinance could be tested.

Judgment affirmed.

All the Justices concur, except HOLDEN, J., not presiding.

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**COLORADO SOUTHERN, N. O. & P. R Co. v. BOAGNI.**

(Supreme Court of Louisiana, Nov. 26, 1906. Rehearing Denied Feb. 4, 1907.)

[42 So. Rep. 932.]

**Eminent Domain—Railroad Right of Way—Selection of Route.\*—**

Where, in a suit to expropriate property for the building of a railroad, the evidence fails to disclose that the plaintiff, in selecting its route, has been actuated by any wanton purpose to inflict injury, and, on the other hand, makes it clear that the route has been selected in good faith, the right of the expropriating corporation to select its route will not be subjected to judicial control.

**Same—Compensation—Valuation by Jury.**—A jury composed of farmers, necessarily owners of real estate, and probably of farms and plantations, is particularly well qualified to deal with the question of the compensation which should be awarded to the owner for the expropriation of a right of way for a railroad through his plantation, and will not lightly be presumed to have done such owner an injustice in estimating the value of the property taken or the damage inflicted. On the other hand, whilst the assessment of values and damages in such cases should not be exorbitant, the citizen whose property is taken, without his consent, for a purpose, which, though quasi public, is in the main predicated upon considerations of private profit, ought to be paid full value.

(Syllabus by the Court.)

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\*For the authorities in this series on the subject of the powers of a railroad company in regard to the location of its route, see foot-notes appended to *Brown v. Atlantic & B. Ry. Co. (Ga.)*, 24 R. R. R. 255, 47 Am. & Eng. R. Cas., N. S., 255, where all the preceding authorities in this series are collected.

**Colorado Southern, etc., R. Co. v. Boagni**

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; Edward Taylor Lewis, Judge.

Action by the Colorado Southern, New Orleans & Pacific Railroad Company against Edward M. Boagni. Judgment for plaintiff, and defendant appeals. Affirmed.

*Lewis & Lewis and Kenneth Baillio*, for appellant.

*Dudley Louis Guilbeau, Robert Lee Garland, and Miller, Dufour & Dufour*, for appellee.

*Edward Benjamin Du Buisson*, amicus curiæ.

**Statement of Case.**

MONROE, J. Plaintiff brings suit to expropriate a right of way for its railroad from east to west through defendant's ("Belle-mont") plantation, near Opelousas, and defendant answers, admitting the necessity of traversing the plantation, but alleging that it is unnecessary to build the road on the particular line selected, and insisting that it be built upon a line a few hundred yards farther to the north. He alleges that, if the right of way be expropriated as proposed, he should be allowed \$22,604.77, of which \$2,272.30 represents the value of the land actually taken, and the balance is made up of various items of damage claimed by him.

There was a trial resulting in a verdict reading as follows:

"We, the jury, find that plaintiff is entitled to the line of its railroad as claimed in its petition. And defendant is entitled: (1) for value of land expropriated, \$1,100; (2) for all other damages suffered, separately from land expropriated, \$1,259.40; (3) for inconvenience that will be suffered, \$700. Further, plaintiff company must install all necessary crossings, culverts and cattle guards."

Which verdict having been made the judgment of the court, defendant has appealed (the judgment having, in the meanwhile, been executed, as authorized by the statute), and plaintiff answers the appeal, praying that the items \$1,259.40 and \$700 be disallowed.

**Opinion.**

It appears from the evidence adduced on the trial that, in the fall of 1905, plaintiff and another railroad company were seeking to get into Opelousas, and that both companies were granted the right to enter by way of Convent street, which traverses the northern section of the town, from east to west, and is about 40 feet wide. Plaintiff, then, with a view to the extension of its road to, and beyond, Bayou Teche, caused a survey to be made of a route extending eastward, from the end of Convent street, through the adjacent property and the plantation of the plaintiff, which latter lies not far from the town limits. Subsequently, in January, 1906, because Convent street was scarcely wide enough to accommodate two roads, because the plaintiff's road had been located on the north side of the street, whilst the business part of the town lies to the south, and possibly



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for other reasons, the town council granted plaintiff the right to enter by way of Chaney street, which, running parallel with Convent street, lies some hundreds, or perhaps 1,000, feet to the south of it; and plaintiff appears, thereupon, to have prosecuted the work of acquiring the right of way to the eastward with reference to that fact, and so far succeeded that it had acquired such right between the town limits and the western boundary of defendant's plantation, and between the eastern boundary of said plantation and the Teche (save as to a few small places), when it met with an objection from defendant, who preferred that it should adhere to the route originally surveyed, and refused to consent to the adoption of the other route, save on payment of \$5,000.

We may dispose of the first objection urged by defendant by saying that the evidence fails, utterly, to show that the route here in question was selected with any wanton purpose to inflict injury, whether upon defendant or any one else, and, upon the other hand, makes it clear that such route was selected in perfect good faith, and because it is the best and most desirable from an engineering point of view and when considered with reference to the general course of the road and to the right of way already acquired. Under such circumstances, the right of selection vested in the expropriating corporation will not be subjected to judicial control. Cyc. vol. 15, p. 634; *Thibodeaux v. Maggioli*, 4 La. Ann. 73. As may be inferred from the fact that defendant was willing to accept \$5,000 as compensation for the value of land to be taken and for all damages, the present claim for \$22,604.77, is greatly exaggerated.

It is, however, just to defendant, to say that he offers, in his petition, to grant the right of way, by the northern route, for \$1,057, and, whilst on the stand as a witness, expressed himself as willing that plaintiff should have it without charge rather than that the route selected should be finally adopted. He complains that the southern route cuts off the major part of the open land from the plantation buildings but, from the map which his counsel have produced, there appears to be about as much open land to the north of the proposed route as to the south, and, whether the road be built upon the one route or the other, it is quite certain that there must be large bodies of land of that kind on both sides, and that, so long as the 2,500 or 3,000 acres now owned by defendant are held together, as one plantation, the owners must reconcile themselves to, and may, perhaps, congratulate themselves upon the idea that they have a railroad running through it. We say that the owners may, perhaps, congratulate themselves, because in reading some of the testimony, to the effect that, in times past, they have had to haul cotton for 25 miles, we cannot disabuse our minds of the impression that a railroad station nearer at hand might not be an unqualified evil. Defendant complains that there will be "cuts" and "fills" on the proposed route which will render the crossing of the road inconvenient, but the evidence shows that the average depth and height of the "cuts" and "fills" would be about the same by the one route as the other, and that such plantation



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roads, running north and south, as are needed, can, with no great inconvenience, be arranged to cross the railroad at points where no grading is needed. There are many items of alleged prospective damage to particular tracts of land; in one instance amounting, it is said, to the total loss of a tract of 6.94 acres, valued at \$100 an acre, in others to a depreciation of 50 per cent., and, in one case, to a depreciation to the extent of 15 per cent., in the value of 997 acres, of which 114 acres is woodland, and all of which is valued at \$100 an acre, though defendant bought it, a little more than two years before this suit was filed, for less than \$40 an acre. It was stated by defendant's counsel in the argument that the jury by which the case was tried were farmers, and, as they live in the parish and are necessarily the owners of real estate, and probably of farms and plantations, it seems to us that they were particularly well qualified to deal with the question presented and very unlikely to have done any injustice to the defendant. At all events, our reading of the record has not convinced us that they have erred in that direction. On the other hand, whilst we are inclined to think that they have been liberal, we are not prepared to say that their assessment of values is exorbitant or unconscionable. When the property of a citizen is taken without his consent for a purpose which though quasi public, is predicated, in the main, upon considerations of private profit, he ought to be paid its full value.

Judgment affirmed.

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**ALLEN v. ATLANTIC COAST LINE R. CO.**

(Supreme Court of North Carolina, Oct. 16, 1907.)

[58 S. E. Rep. 1081.]

**Master and Servant—Action by Servant for Injury—Sufficiency of Evidence—"Last Clear Chance."**—In an action by a servant, a brakeman, for personal injuries, evidence considered, and held not to warrant the submission of the issue of "last clear chance."

**Same—Method of Work—"Flying Switch" as Negligence Per Se.\***—Making a flying switch is not negligence per se as to the employee performing it. It is the attempt to make a running switch when the detached car has no brakeman on it, and is under no control, that is declared to be negligence, because highly dangerous.

**Same—Contributory Negligence of Servant.**—In an action by a servant, a brakeman, against a railroad company for personal injuries, evidence as to contributory negligence considered, and held sufficient to go to the jury.

Appeal from Superior Court, Lenoir County; E. B. Jones, Judge.

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\*See note appended to *Hunt v. Hurd* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 741; *Fox v. Pennsylvania R. Co.* (Pa.), 18 Am. & Eng. R. Cas., N. S., 198.

*Allen v. Atlantic Coast Line R. Co*

Action by William Allen against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The court submitted the following issues:

“(1) Was the plaintiff, William Allen, injured by the negligence of the defendant? (2) Did the plaintiff, William Allen, contribute to his injury by his own negligence? (3) What amount, if any, has plaintiff been damaged?” The jury answered first issue, “Yes,” and second issue, “Yes.” From the judgment that the defendant go without day, the plaintiff appeals.

*Loftin & Varser, G. V. Cowper, and M. H. Allen, for appellant.*

*Rouse & Land, for appellee.*

BROWN, J. Upon the trial the plaintiff tendered the issues submitted, and also another issue, as follows: “If the plaintiff contributed to his own injury, could the defendant have avoided the injury by due care?” The refusal of the court to submit this issue is strongly pressed by plaintiff as error. The contention of a plaintiff that, although he may be guilty of negligence, yet the defendant had the last opportunity to prevent injury, can be presented under the issue of contributory negligence, as negligence to bar recovery must be shown to be the proximate cause. *Baker v. Railroad*, 118 N. C. 1021, 24 S. E. 415; *Ramsbottom v. Railroad*, 138 N. C. 38, 50 S. E. 448. We find nothing in this case which warrants the application of the so-called doctrine of the “last clear chance.” The only person who it is claimed could have intervened and saved the plaintiff from injury was the brakeman, Outlaw; and we see nothing in the evidence to sustain the contention that he could have done it. It appears by plaintiff’s own testimony that he had been employed on a freight train of defendant and was an experienced brakeman; that he was ordered by the conductor to go help Elias Outlaw place some shanty cars on the siding; that, instead of going to the side of the shanty cars where the ladders were, he let the shanties pass, and jumped on a coal car, which was the first car after the shanties passed. In respect to this contention, the plaintiff’s evidence is as follows: “As soon as I caught the coal car, which was the first car that reached me after the shanties passed, I got upon the platform of the coal car and at once started to step from it to a ladder on the shanty car, which I was going to place on the said track. Just as I was stepping to this ladder on the shanty car, the switchman cut off the cars, and dropped me from the center of the track down to the ground.” This testimony makes the acts of plaintiff and the switchman, Outlaw, practically simultaneous. Upon the plaintiff’s statement, then, there was no intervening time between his step and the act of Outlaw in disconnecting the cars to have enabled any agency to have been brought to bear upon the occurrence which could have averted the injury. Therefore there is no possible deduction in the testimony which would have permitted the submis-

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sion of this issue. Again, there is no evidence in the record that Outlaw saw the plaintiff as he started to climb from the moving coal car onto the shanty, or that Outlaw had any reason to expect the plaintiff to take that way of going on top of the shanty, instead of the usual method of climbing from the ground by the ladders. There was no "last clear chance" left to Outlaw to avoid the injury, and no evidence that he neglected any duty he as a fellow servant owed the plaintiff. The evidence, therefore, does not support the issue tendered, and, for the same reason, we think his honor properly declined to give plaintiff's prayer for instruction embodying such contention. *Ellerbe v. Railroad*, 118 N. C. 1026, 24 S. E. 808; *Taylor v. Railroad*, 109 N. C. 236, 13 S. E. 736. The only exception to the evidence and most of the prayers for instruction relate to the first issue, and, as the injury answered that issue in favor of the plaintiff, it is unnecessary to consider them.

2. The contention of plaintiff, as presented in prayers for instruction upon the second issue, that "kicking" cars is negligence per se, and the proximate cause of the plaintiff's injury, seems to be founded upon a misapprehension of the decisions. The word "kicking" seems to be used in railroad parlance as synonymous with making a "flying switch." This court has never held such operations to be per se negligence in respect of the employees performing them. It is "the attempt to make a running switch when the detached car has no brakeman on it, and is under no control, that is declared to be negligence, because highly dangerous." *Wilson v. Railroad*, 142 N. C. 336, 55 S. E. 257, and cases there cited.

3. The plaintiff further requested the court to charge that there is no evidence of contributory negligence. We think his honor properly denied his prayer. There is ample evidence in the record to go to the jury upon that issue. In fact, his honor might well have instructed the jury that the plaintiff upon his own showing was guilty of contributory negligence, and by his careless conduct caused his injury. Plaintiff was ordered to assist the switchman. Elias Outlaw, in sidetracking the "shanties." Being a brakeman, he knew his place was on top of the shanties and at the brakes, so he could control the cars as they were "shunted" or "kicked" from the track onto the switch. He jumped from the ground to the moving coal car, next to the shanty, for the purpose of ascending the ladder. When he mounted the coal car, he saw the switchman at the crank, and knew he was in the act of "cutting loose" the shanties, as ordered. The plaintiff never called to Outlaw, but took his chances, and endeavored to leap onto the shanty car just as the switchman "cut it loose." The plaintiff probably believed that he could successfully make the leap, or doubtless he would not have attempted it. He made a mistake as other unfortunate men have done before, and fell to the ground between the moving cars, and was injured.

The majority of the court is of opinion that there is no error.

SOUTHERN RY. CO. *v.* SMITH.

(Supreme Court of Appeals of Virginia, Nov. 21, 1907.)

[59 S. E. Rep. 372.]

**Master and Servant—Injuries to Servant—Constitutional Provision—Abolishing Fellow Servant Doctrine—Construction.\***—A yard foreman of a railway company, in the discharge of whose duties it was customary and necessary for him to ride on a yard engine, and whose position on the step of the engine at the time he was thrown therefrom was the usual and proper place for him to be, is an employee "engaged in service requiring his presence" on an engine within Const. § 162, abolishing as to such an employee the doctrine of fellow servant so far as it affects the employer's liability for injuries to the employee resulting from another employee's acts or omissions, and authorizing a recovery for injury due to the act or omission of a co-employee in another department or in charge of a switch, signal point, or engine; that section not being limited to an employee actually engaged in the operation of the engine, but extending to others present in the reasonable and proper discharge of their duties.

**Same—"Fellow Servants"—Who Are.†**—All serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, though in different grades or departments, are fellow servants.

**Same.‡**—A yard foreman who had no authority over a yard engineer, except to direct him when and where to move his engine, and who did not have the right of employment or discharge of the engineer, was not a vice principal as to such engineer, but a fellow servant, within Const. § 162, abolishing the doctrine of fellow servant

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\*For all the preceding authorities in this series on the question of the applicability of employers' liability acts, see foot-notes appended to *Cahill v. Boston & M. R. R.* (Mass.), 18 R. R. R. 830, 41 Am. & Eng. R. Cas., N. S., 830; where they are collected; foot-notes appended to *Bradford Construction Co. v. Heflin* (Miss.), 24 R. R. R. 483, 47 Am. & Eng. R. Cas., N. S., 483; *Pittsburg, etc., Ry. Co. v. Lighthouse* (Ind.), 22 R. R. R. 130, 45 Am. & Eng. R. Cas., N. S., 130; *Southern Ry. Co. v. Simmons* (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572.

†For the authorities in this series on the subject of the different department limitation of the fellow servant rule, see foot-notes appended to *Neagle v. Syracuse, etc., R. Co.* (N. Y.), 22 R. R. R. 89, 45 Am. & Eng. R. Cas., N. S., 89; foot-notes appended to *Lanning v. Chicago G. W. Ry. Co.* (Mo.), 22 R. R. R. 81, 45 Am. & Eng. R. Cas., N. S., 81; foot-notes appended to *Betchman v. Seaboard Air Line Ry.* (S. Car.), 21 R. R. R. 535, 44 Am. & Eng. R. Cas., N. S., 535.

‡For the authorities in this series on the question whether a foreman is a fellow servant of a hand working under him, see foot-notes appended to *Peterson v. Philadelphia, B. & W. R. Co.* (Pa.), 23 R. R. R. 150, 46 Am. & Eng. R. Cas., N. S., 150; *Russel v. Lehigh Valley R. Co.* (N. Y.), 23 R. R. R. 135, 46 Am. & Eng. R. Cas., N. S., 135.

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so far as it affects the employer's liability for injuries to the employee resulting from another employee's acts or omissions as to every employee engaged in any service requiring his presence on a train, car, or engine, and authorizing a recovery by such an employee for injury due to the act or omission of a co-employee in another department or in charge of a switch, signal point, or engine.

**Writ of Error—Review—Amount of Damages.**§—A verdict for \$15,000 for the loss of an arm by a yard foreman will not be disturbed as excessive where there is nothing else to suggest that the jury was influenced by prejudice or acted under any misconception of the merits of the case.

**Same.**—The Supreme Court will not disturb a verdict in a personal injury action as excessive, unless the damages are such as to warrant the belief that the jury must have been influenced by prejudice or misled by some mistaken view of the merits of the case.

Error from Circuit Court, Amherst County.

Action by N. J. Smith against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*Horsley, Kemp & Easley*, for plaintiff in error.

*Lee & Howard*, for defendant in error.

HARRISON, J. This writ of error brings up for review the proceedings in an action, brought by the defendant in error, to recover damages for a personal injury alleged to have been occasioned him by the negligence of the plaintiff in error. There was a verdict and judgment in favor of the plaintiff for \$15,000, which we are asked to reverse and set aside.

The essential facts established by the record are that the plaintiff was in the employment of the defendant railroad company as yard foreman and station agent at Monroe, a division and terminal in Amherst county. His duty required him to superintend generally the operations in the yard, and among other things to go from point to point therein, switching cars, making up trains, and getting them in and out of the yard. In the discharge of these constantly recurring duties in an extensive yard, it was customary and necessary for the plaintiff to ride from point to point on the switching engine. He had been engaged with duties of this character on the evening of the accident, and was returning from the performance of his work in the direction of the yard office, standing, as was his custom, on the step of the engine, holding to the handholes placed there for the purpose with both hands. The position of the plaintiff on the step of the engine was within two feet of the engineman, who was then and there directed by the plaintiff as to the next point to take the engine, and further told to slow up as he passed the office, in

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§For all the preceding authorities in this series on the subject of the sufficiency of damages for injuries to, or loss of, limbs, see foot-notes appended to *Campbell v. Railway Transfer Co.* (Minn.), 22 R. R. R. 61, 45 Am. & Eng. R. Cas., N. S., 61, where they are collected.

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order that the plaintiff might get off for the purpose of discharging certain duties there that demanded his attention. As the office was approached, the engineman, with full knowledge of the plaintiff's position, applied the steam in such manner as to cause the engine to suddenly and violently lunge forward, in an unusual and dangerous manner, thereby throwing the plaintiff to the ground and under the wheels of the engine, which crushed and destroyed his arm.

We are of opinion that the negligence of the defendant company is clearly established, and that the evidence is quite sufficient to justify the conclusion of the jury that the plaintiff was not guilty of contributory negligence.

The assignment of error chiefly relied on involves the relation existing at the time of the accident between the plaintiff and the engineer. The theory of the plaintiff, which was adopted by the trial court, is that at the time of the commission of the negligent act complained of he was a fellow servant of the engineer, with the same right to recover of the defendant that he would have had if such negligent act had been that of the defendant company itself in the performance of a nonassignable duty; it being insisted on behalf of the plaintiff that he comes within the provisions of section 162 of the Constitution, which abolishes the doctrine of fellow servant as to certain classes of railroad employees, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master. The contention of the defendant company is that the presence of the plaintiff on the engine was not required by the services in which he was engaged when injured, and therefore that the company is not liable, although the injury was inflicted by the negligence of the engineer. It is further contended, on behalf of the railway company, that the plaintiff was not a fellow servant of the engineer, but that, as yard foreman and station agent, he occupied the master's position as to the engineer, who was an inferior servant; and that as such vice principal, claiming for injury from his subordinate's act, the defendant of assumed risk is not intended to be touched by section 162 of the Constitution.

Omitting such parts of section 162 of the Constitution as do not apply to this case, it reads as follows: "The doctrine of fellow-servant, so far as it affect the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servant of the common master, is \* \* \* abolished as to every employee engaged \* \* \* in any service requiring his presence upon a train, car or engine; and every such employee shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master that a servant would have \* \* \* if such acts or omissions were those of the master himself, in the performance of a non-assignable duty; provided the injury so suffered by such railroad employee result from the negligence of \* \* \* a co-employee engaged in an-



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other department of labor \* \* \* or who is in charge of any switch, signal point, or locomotive engine."

The language, "every employee engaged \* \* \* in any service requiring his presence on a train, car or engine," manifestly means every one who may be there in the line of duty. We cannot pick out the single word "requiring," and attach to it the restrictive meaning contended for by the railway company. This would exclude from the benefits of the constitutional provision every employee except those actually engaged in the operation of the engine, although the presence there of some other might be in the line of a reasonable and proper discharge of his duty. If his presence on the engine is in the usual and proper discharge of his duty, he is rightfully there, and is entitled to the benefit of the protection afforded him by the Constitution.

Looked at from the standpoint of a demurrer to the evidence, as this record must be, the undisputed facts are that the duties of the yard foreman required him to accompany and ride upon the yard engine from one point to another in the yard; that it was both proper and customary for him to ride on the engine as he was doing at the time of the accident; that his position on the step of the engine was, not only a reasonably safe place, but that it was the place at which it was usual, customary, and proper for him to be. There is no denial that the plaintiff had so interpreted the requirements of his position for years, and it does not appear that the railway company expected such duties to be discharged in any other way.

As to the contention that the yard foreman and the engineer were not fellow servants under the law as it was prior to the date on which the Constitution of 1902 became effective, it clearly appears that the yard foreman had no authority or power over the yard engineer, except to direct him when and where to move his engine in shifting and transferring cars on the yard. He possessed none of the power of a vice principal, such as the right of selection, employment, or discharge of the engineer, or any authority over him in the operation of the engine. He could only direct his movements on the yard as any other foreman or boss could do. If the engineer disobeyed or was for any reason unsatisfactory, the yard master could only report him to a common superintendent for his action.

All serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, are fellow servants, and take the risk of each other's negligence. *N. & W. Ry. Co. v. Donnelly's Adm'r*, 88 Va. 853, 14 S. E. 692.

In the case of *N. & W. Ry. Co. v. Nuckol's Adm'r*, 91 Va. 207, 21 S. E. 347, the principle is succinctly stated as follows: "The liability does not depend upon the fact that the servant injured may be in a different department of the service from the wrongdoer. The test is: Were the departments so far separated from each other as to exclude the probability of contact and of

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danger from the negligent performance of their duties by employees of the different departments. If they are so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow servant in such other department. The liability does not depend upon gradations in employment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice principal."

In the case of *Richmond Locomotive Works v. Ford*, 94 Va. 643, 27 S. E. 511, this court says: "Where the execution of work directed to be done by the master or his representative is entrusted to a gang or group of hands, it is necessary that one of them should be selected as the leader, boss, or foreman to see to the execution of such work. This sort of superiority of service, as has been said, is so essential and so universal that every workman in entering upon a contract of service must contemplate its being made in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of any other fellow workman. The foreman or superior servant stands to him in that respect in the precise position of his other fellow servant."

In the case of *N. & W. Ry. Co. v. Houchins*, 95 Va. 404, 28 S. E. 580 (46 L. R. A. 359, 64 Am. St. Rep. 791) this court says: "And the mere fact that another engaged in the same work or employment is, by the rules of the master for the direction and government of those in his employ, made a leader, boss, or conductor, or by whatever name he might be designated or known, to see to the execution of the work, and by the neglect of this leader, boss, or conductor one engaged in the same common work of the master is injured, does not of itself place the one so put in authority in the category of principal or vice principal." And again, on page 406 of 95 Va., page 581 of 28 S. E. (46 L. R. A. 359, 64 Am. St. Rep. 791), it is said: "The running of trains by a railroad company is work of such a character as to make it essential that one of the crew on each train be selected as a leader, boss, or conductor, as he is always known, to direct the execution of the work, and this kind of superiority, it may be said, is as essential and universal in the moving of trains upon a railroad as in other pursuits when the employees work in squads, gangs, or crews. Every man in entering upon a contract of service upon a train as fireman, engineman, or brakeman must contemplate its being run under the orders and directions of a conductor, who, though designated as conductor, with authority to control and direct the men under him, is but a co-laborer, or co-workman, with the other members of the crew, engaged in a work of mere operation, a common employment, under one and the same common employer, from whom all derive their authority and compensation." See, also, *Moore Lime Co. v. Richardson's Adm'r*, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785; *Eckle's Adm'r v. N. & W. Ry. Co.*, 96 Va. 69, 25 S. E. 545; *Southern*

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Ry. Co. v. Mauzy, 98 Va. 692, 37 S. E. 285; Trigg Co. v. Lindsay, 101 Va. 193, 43 S. E. 349.

In view of the evidence in this case, and under the law as it was when the present Constitution became effective, as shown by the authorities cited, the relation existing between the yard foreman and the yard engineer in question was that of fellow servant.

The presence of the plaintiff in this case being, as we have seen, required upon the yard engine at the time of the accident, and the relation existing between himself and the engineer being that of fellow servants, he comes clearly within the protection afforded such an employee by the provisions of section 162 of the Constitution, which abolishes the fellow-servant doctrine, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master. This provision of the Constitution makes no distinction between superior and inferior servants. The language is: "Abolished as to every employee of a railroad company engaged in any service requiring his presence upon an engine" and "every such employee shall have the same right to recover," etc.

These considerations dispose of the material questions raised by the exceptions taken to the action of the circuit court in giving and refusing instructions. The instructions given conform to the view of the law herein expressed, and submit the case to the jury without prejudice to the rights of the plaintiff in error.

It is further assigned as error that the verdict is excessive.

It is true that \$15,000 is a larger verdict than we usually encounter as an award of damages for the loss of an arm; but this furnishes no warrant for our interference with the finding. The question to be considered is not whether this court, if acting in the place of the jury, would give more or less than the amount of the verdict, but whether the damages awarded by the jury is so large or so small as to indicate that the jury has acted under the impulse of some undue motive, some gross error, or misconception of the subject. There is no rule of law fixing the measure of damages in such cases, and it cannot be reached by any process of computation. It is therefore the established rule, settled by numerous decisions extending from *Farish & Co. v. Reigle*, 11 Grat. (Va.) 697, 62 Am. Dec. 666, to the recent case of *N. & W. Ry. Co. v. Carr*, 106 Va. 508, 56 S. E. 276, that this court will not disturb the verdict of the jury, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. The record in the case at bar furnishes no suggestion that the jury were influenced by partiality or prejudice, or by any misconception of the merits of the case; nor is there anything to indicate that they were not moved to their conclusion from a sense of right and justice.

The circuit court did not err in refusing to set the verdict aside, and its judgment must be affirmed.

LOUISVILLE N. R. Co. v. MELTON.

(Court of Appeals of Kentucky, Nov. 19, 1907.)

[105 S. W. Rep. 366.]

**Constitutional Law—Equal Protection of Laws.\***—Act Ind. March 4, 1893 (Laws 1893, p. 294, c. 130) § 1, imposing on every railroad or other corporation, except municipal corporations, a liability for injury to an employee, where the injury is sustained as therein prescribed, applies to all persons, whether natural or artificial, operating a railroad, and is not subject, as to the operation of railroads, to the constitutional objection that it imposes on corporations burdens not imposed on individuals.

**Same.\***—The act is not unconstitutional, as to a carpenter in the employ of a railroad, on the ground that the state may not establish a rule for carpenters in railroad service and another rule for carpenters not in such service.

**Courts—Jurisdiction—Actions Under Laws of Other States—Comity between Courts.†**—A cause of action accruing to a railroad employee under Act Ind. March 4, 1893 (Laws 1893, p. 294, c. 130) § 1, imposing on every railroad or other corporation, except municipal, operating in that state, a liability for injury to an employee, where the injury is sustained as therein prescribed, will be enforced in Kentucky, even though the courts of Indiana would not enforce, as they doubtless would, a cause of action accruing in Kentucky.

**Master and Servant—Action for Injuries to Employee—Question for Jury.**—In an action by a carpenter for injuries due to the breaking of a chain holding a pulley used in raising a bent, whether a reasonably safe appliance was furnished held for the jury.

**Same—Instructions.**—In an action by a carpenter for injuries due to the breaking of a chain holding a pulley used in raising a bent, under Act Ind. March 4, 1893 (Laws 1893, p. 294, c. 130) § 1, imposing a liability on railroad corporations for injury to employees, where the injury is due to any defect in appliances furnished resulting

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\*For the authorities in this series on the subject of the constitutionality of employers' liability acts, see foot-notes appended to *Kane v. Erie R. Co.* (C. C. A.), 20 R. R. R. 233, 43 Am. & Eng. R. Cas., N. S., 233; *Bradford Construction Co. v. Heflin* (Miss.), 24 R. R. R. 483, 47 Am. & Eng. R. Cas., N. S., 483; *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.), 22 R. R. R. 130, 45 Am. & Eng. R. Cas., N. S., 130; *McGuire v. Chicago, etc., R. Co.* (Iowa), 21 R. R. R. 390, 44 Am. & Eng. R. Cas., N. S., 390.

†For the authorities in this series on the subject of transitory actions and the extraterritorial effect of statutes creating a right of action, see foot-notes appended to *Cincinnati, etc., Ry. Co. v. Hansford & Son* (Ky.), 23 R. R. R. 526, 46 Am. & Eng. R. Cas., N. S., 526; foot-notes appended to *Morrison v. San Pedro, etc., R. Co.* (Utah), 22 R. R. R. 690, 45 Am. & Eng. R. Cas., N. S., 690; foot-notes appended to *Lee v. Missouri Pac. Ry. Co.* (Mo.), 22 R. R. R. 375, 45 Am. & Eng. R. Cas., N. S., 375.

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from the negligence of the corporation or some person intrusted with the duty of keeping such appliances in proper condition, or where the injury results from the negligence of any person to whose order the injured employee is bound to conform, instructions that if plaintiff's injury was due to any defect in the appliances furnished, and such defect was the result of negligence by defendant's foreman of the crew with which plaintiff was working, and who was a person intrusted by defendant with the duty of keeping appliances in proper condition, and plaintiff was in the exercise of due care, he was entitled to recover; that if the injury resulted from the negligent orders of the foreman, and plaintiff was bound to conform to such foreman's orders, and was exercising due care, he was entitled to recover; and that plaintiff was not entitled to recover because an appliance was not reasonably safe, if such condition was unknown to the foreman and would not have been discovered by him by the exercise of ordinary care—were in accord with the statute.

**Damages—Excessive Amount—Personal Injuries.**—Plaintiff, a carpenter, was injured by the falling of a bent which he was assisting to raise. At the time of the injury he was a healthy young man weighing 145 pounds, but at the trial weighed but 116 pounds. One leg was fractured at the knee, the other at the hip, and his ribs on one side were broken, and also his back. He was paralyzed from his waist down. His bowels and bladder had to be moved with an instrument, and his virility was destroyed. His suffering for six or eight weeks was very intense, and after that he was never free from pain. At the time of the injury he was capable of earning \$3 a day. Held, that a verdict for \$22,000 was not excessive.

Appeal from Circuit Court, Hopkins County.

“To be officially reported.”

Action by Spencer Melton against the Louisville & Nashville Railroad Company, for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

*Benjamin D. Warfield and Waddill & Dempsey, for appellant.*  
*Gordon, Gordon & Cox and Clay & Clay, for appellee.*

HOBSON, J. Spencer Melton was a carpenter in the service of the Louisville & Nashville Railroad Company, and on March 2, 1905, was engaged in building a coal chute on the railroad tracks near Howell, Ind., working under a foreman named Shrode. In building the coal chute it became necessary to set up some bents, weighing about 1,200 pounds each, and 22 feet long. To raise up the bents they used a pulley, block, and tackle. The bent was raised by the hands pulling on the rope. The pulley was fastened to a square beam by an iron chain similar to those used for locking a wagon. The bent was too heavy for the men to carry it up at once. They would surge upon the rope, and thus lift it a little, and then, after catching their breath, would surge again. To prevent the bent from going back when thus lifted up, Melton, by the direction of the foreman, got a piece of timber and propped

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the bent, to hold it at the height to which it had been raised when the men made a surge. The foreman had a similar piece of timber and propped the bent on the opposite side from Melton. While they were thus engaged in raising the bent, the chain which held the pulley broke, the bent fell, catching Melton under it, and smashing him down upon other timbers, fracturing one leg at the knee, the other at the hip, breaking the ribs on one side, and also breaking his back. By reason of his injuries he was paralyzed from his waist down. The bowels and bladder have to be moved with an instrument. His virility is destroyed. He has no feeling in the right leg, or use of it, and the left is but little better. He was then a healthy young man, weighing 145 pounds. Now he weighs 116 pounds. His suffering for six or eight weeks was very intense, and since then, while he has not suffered so much, he is never free from pain. The pain in his back is continuous. He was treated in sanitariums at Chicago, St. Louis, and Evansville, as well as by local doctors at his home. The testimony of the physicians show that his injuries are permanent. In this suit brought by him to recover from his injuries, the jury found for him and fixed his damages at \$22,000. The court entered judgment upon the verdict, and the railroad company appeals.

The action was brought under a statute of Indiana, which, so far as material, is as follows:

"An act regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases, and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state; provided further, that its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency.

"Approved March 4, 1893.

"Section 1. Be it enacted by the General Assembly of the state of Indiana, that every railroad or other corporation except municipal operating in this state, shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases:

"First: When such injury is suffered by reason of any defect in the condition of ways, works, plants, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"Second: Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform and did conform.

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"Sec. 4. In case any railroad corporation which owns or op-



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erates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned and operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such persons shall have been injured as a defense to the action brought in this state."

Laws, 1893, p. 294, c. 130.

It is insisted for the railroad company that the act is unconstitutional in this: that it applies to corporations and does not apply to the individuals whose employees may be injured. The Supreme Court of Indiana has construed the statute only to apply to railroad companies. It is held that it applies to all persons, whether natural or artificial, operating a railroad, and that it does not apply to any other business. The United States Supreme Court has affirmed the constitutionality of the statute, basing its judgment upon the construction of the statute given by the Supreme Court of Indiana. *Railroad Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301; *Tullis v. Railroad Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; *Railroad Co. v. Lightheiser* (Ind.) 78 N. E. 1033; *Indianapolis, etc., R. R. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; *Bedford Quarries Co. v. Bough* (Ind.) 80 N. E. 529.

It is earnestly insisted that, while the act is constitutional under these rulings as to those operating a railroad, it cannot be held constitutional as to a carpenter; that the state may not establish a rule for carpenters in the service of a railroad, and another rule for carpenters in the service of other people. We are unable to see the force of this distinction. A railroad cannot be run without bridges. Bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operating of a railroad than bridges, because the engines cannot be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad. As has been well said, the Legislature cannot well provide for all subjects in one act. Legislation must necessarily be done in detail, and an act regulating railroads violates no constitutional provision because it is made to apply only to railroads. *Indianapolis, etc., R. R. Co. v. Kane* (Ind.) 80 N. E. 841; *Schoolcraft's Adm'r v. L. & N. R. R. Co.*, 92 Ky. 233, 17 S. W. 567, 14 L. R. A. 579; *Chicago, etc., R. R. Co. v. Stahley*, 62 Fed. 363, 11 C. C. A. 88; *Callahan v. Railroad Co.*, 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746; *Railroad Co. v. Callahan*, 194 U. S. 628, 24 Sup. Ct. 857, 48 L. Ed. 1157; *Railroad Co. v. Ivey*, 73 Ga. 504.

The defendant also insisted that the act cannot be enforced in this state, because it provides that the decisions and statutes of other states shall not be read or considered in the courts of

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Indiana. It is said that the statutes of Indiana are only considered in this state by comity, and that it will not be enforced in this state when the courts of Indiana do not treat the Kentucky statutes and decisions with like comity. The section in question has been held unconstitutional by the courts of Indiana. *Baltimore & Ohio S. W. R. Co. v. Reed*, 158 Ind. 25, 62 N. E. 488, 56 L. R. A. 468, 92 Am. St. Rep. 293. But, aside from this, when the plaintiff was injured at Howell, Ind., a cause of action accrued to him; and this cause of action which there accrued to him he is seeking to enforce by this action. The rights of the parties must depend on the facts as they then existed. The cause of action which Melton then had the courts of Kentucky will enforce. We have no doubt the courts of Indiana do the same as to a cause of action accruing here. But, if they did not, the fact that they did not administer justice would be no reason why this court should deny justice to a litigant here. No reason of public policy exists why the courts of this state should be closed to a citizen of this state seeking to enforce a meritorious cause of action.

The proof on the trial on behalf of the plaintiff showed that the chain was not the proper one for the work in which it was used, that it was supplied by the foreman, and that he had ordered the men to use it. The proof also showed that the chain was a defective one of its kind, and that this might have been discovered by an ordinary examination of it. The broken link has been brought to this court with the record, and an examination of it indicates that the iron was not properly welded when the link was made. The plaintiff also showed that a chain of long links like this, when put around a square sill, is much more liable to pull in two at the corners of the sill, where the strain would tend to pull the link open, than it would be if the chain was stretched straight and a direct strain put upon it. The only expert who testified on the trial stated that the chain had a strength of 6,000 pounds; that the rule was that a chain would have a strength 6 times as great if the strain was steady and 16 times as great if it come by jerks. The weight of the bent here was greater than one-sixth of the strength of the chain, and in lifting the bent they put much more strain upon the chain than the weight of the bent, because, the rope being at an acute angle to the bent, a large part of the power went against the ground at the foot of the bent. In addition to this, the strain being by jerks, a much stronger chain was required, especially as at the corners of the sill the strain would be great. It is apparent, from an examination of the link brought here, that the link pulled open. There was therefore proof that the master did not furnish the servant a reasonably safe appliance, and that by reason of the insufficiency of the appliance, the servant received the injuries sued for. The court properly refused to instruct the jury peremptorily to find for the defendant, and submitted the question of negligence to the jury.

The court, among other things, instructed the jury as follows:

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"(1) The court instructs the jury that if they believe from the evidence that the injury received by the plaintiff, if any, was suffered by reason of any defect in the condition of works or tools connected with or in use in the business of the defendant, and that such defect, if any, was the result of negligence on the part of the defendant's foreman of a construction crew with which plaintiff was working, and who was a person intrusted by the defendant with the duty of keeping such tools or works in a proper condition, and that plaintiff was at the time he received such injury in the service of the defendant, and was at the time in the exercise of due care and diligence, then the law is for the plaintiff, and the jury shall so find. (2) If the jury shall believe from the evidence that the injury to plaintiff, if any, resulted from the negligent orders, if any, of the foreman of the construction crew with which plaintiff was working, such foreman being then in the service of the defendant, and that plaintiff at the time was bound to conform and did conform to the orders or directions of such foreman, and the plaintiff himself was at the time an employee of the defendant, in its service, and was himself at the time in the exercise of due care and diligence, then the law is for the plaintiff, and the jury will so find. \* \* \* (5) The court instructs the jury that they cannot in any event find for plaintiff, because they may believe from the evidence that the chain with which the hitch was made was not reasonably safe, if they shall believe from the evidence such condition was unknown to defendant's foreman, W. C. Shrode, and would not have been discovered by him by the exercise of ordinary care in time to have prevented the injury."

These instructions are in accord with the statute. The foreman ordered the men to use the chain. He ordered them to lift the bent with the block and tackle. He ordered Melton to get a piece of timber and prop the bent, and when Melton was obeying his order, in his presence and under his personal supervision, the bent fell, by reason of the breaking of the chain, and injured him. We cannot see how the injury could have been mislaid in any way by the instructions. The real question in the case was whether the chain was defective, or an improper appliance; and the court by the fifth instruction told the jury that they could not in any event find for the plaintiff, on the ground that the chain was not reasonably safe, if Shrode did not know its condition and could not have discovered it by ordinary care. The instructions asked by the defendant, so far as they were proper, were embraced in those given by the court.

It is earnestly insisted that the verdict is palpably excessive and the result of passion and prejudice on the part of the jury. In a case like that before us, where a young and healthy man has been made a complete wreck, so that life must be to him a burden, a living death, a much larger verdict may be sustained than in a case where the person is killed. The plaintiff was capable of earning something like \$3 a day. He was in the morning of life, and might reasonably expect to increase his earning capacity

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as he rose in his business. But, in view of his expectation of life, at what he had then been making, the verdict is not so excessive as to strike one at first blush as the result of passion and prejudice, when we consider the suffering that he endured and his helpless condition at the trial, when medical skill had done all that it could do for him. In other states a number of verdicts much larger have been sustained for injuries not so serious as those proved here. *Texas, etc., R. Co. v. Kelly*, 34 Tex. Civ. App. 21, 80 S. W. 1073; *Fonda v. St. Paul City Ry. Co.*, 77 Minn. 336, 79 N. W. 1043; *Pittsburgh, etc., Ry. Co. v. Simons (Ind.)* 79 N. E. 911; *Scullin v. Wabash R. Co.*, 184 Mo. 695, 83 S. W. 760; *Alberti v. New York, etc., R. Co.*, 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765; *Retan v. Lake Shore, etc., Ry. Co.*, 94 Mich. 146, 53 N. W. 1094; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Phillips v. London R. R. Co.*, 42 L. T. R. 6.

There was no substantial error in the admission or rejection of evidence. The persons admitted as experts were qualified to testify as such. The weight of their evidence was for the jury. On the whole record, we see no error to the prejudice of defendant's substantial rights.

Judgment affirmed.

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**SAGE v. BALTIMORE & O. R. Co.**

(Supreme Court of Pennsylvania, Oct. 21, 1907.)

[67 Atl. Rep. 985.]

**Master and Servant—Fellow Servant—Negligence.\***—A locomotive engineer is a fellow servant of a locomotive cleaner, and the latter cannot recover for injuries caused by failure of the engineer to report defects in the engine which he was required to do under the rules of the company, and which neglect caused an injury to the cleaner.

**Same—Negligent Inspection.**—If a master employs competent servants for inspection, and gives them reasonable facilities for the work, he will not be liable for the negligent performance of such labor to a fellow servant, unless he knew of the defective manner in which the inspection was conducted.

Appeal from Court of Common Pleas, Fayette County.

Action by Joseph Sage against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

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\*For the authorities in this series on the question whether employees charged with the duty of inspecting appliances, etc., are the fellow servants of the other employees of the railroad company, see foot-notes appended to *Illinois Cent. R. Co. v. Quirey (Ky.)*, 20 R. R. R. 162, 43 Am. & Eng. R. Cas., N. S., 162; *Shuster v. Philadelphia, etc., R. Co. (Del.)*, 19 R. R. R. 6, 42 Am. & Eng. R. Cas., N. S., 6; foot-notes appended to *Marsh v. Lehigh Valley R. Co. (Pa.)*, 9 R. R. R. 545, 32 Am. & Eng. R. Cas., N. S., 545, where all the preceding authorities in this series are collected.

*Sage v. Baltimore & O. R. Co*

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

*James R. Cray, D. W. McDonald, and T. H. Hudson, for appellants.*

*D. M. Hertzog, for appellee.*

STEWART, J. The plaintiff, employed as a locomotive cleaner, received his injuries while attempting to open the iron door in the front of a locomotive, in order to get access to the smoke-stack which he had been ordered to clean. The door was supplied with hinges, but when closed was fastened to the boiler of the engine by bolts and clamps. After the plaintiff had removed the last of these, the door, instead of swinging on its hinges, fell outward against him, forcing him from the bumper where he was standing into the ash pit beneath. The injury he thus sustained was due directly to the absence of pins or bolts from the hinges on which the door was intended to swing. Had they been in place the door would not have fallen, but would have swung open. The absence of these pins or bolts from the hinges is the negligence charged. If we assume that there was negligence in the case, the question remains, whose was the fault? The evidence adduced by the plaintiff furnishes the only explanation we have of the absence of the pins, and that it is the correct one admits of no doubt. Shortly before the accident they were in place, and it is nowhere suggested that they were defective in construction or application, or that they were outworn. The principal witness for the plaintiff, the engineer who was uninterruptedly in charge of this particular engine up until the last run preceding the accident, testified that they were out most of the time, not because of failure on the part of defendant to supply them when required, or because of accident, but that they were removed from their place by those employed in running the engine for a purpose unknown, so far as the evidence discloses, to the defendant, and therefore unauthorized. When in place in the hinges, they prevented the door from fitting tight against the engine, thus allowing more or less draught through the door, and to this extent reducing the steaming capacity of the engine. To correct this, some of the persons employed about the engine would, when occasion seemed to them to require it, remove the pins and tighten the clamps. The evidence leaves it clear beyond question that the absence of the pins on this particular occasion was due to such unwarranted interference.

Since the original displacement of the pins was a malfeasance on the part of some one, for which the defendant could not be held responsible, it follows that, if any liability attached to the defendant for the injury here, it can only be on the ground that it knew, or should have known, by the exercise of proper care, of the absence of the pins, and provided for their replacement. Actual knowledge is not pretended. The accident occurred on the morning of February 27th. The engineer who had been in charge of this particular engine made his last run with it two days be-

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fore, completing his run on the morning of the 25th. He testified that, when he then left the engine in the yard, the pins were not in place. Though a later run was made with the same engine, ending on the morning of the 27th, by another engineer, it was not attempted to be shown that any correction had been made with respect to the pins. We have, then, the absence of the pins for two days next preceding the accident. Under ordinary circumstances, whether or not this period of time would be sufficient to charge defendant with constructive notice of the defect would be a question for the jury to decide from all the evidence; but another fact here intervenes which avoids such inquiry. By the rules and regulations of defendant company it was made a duty of the engineer, daily on the completion of his run, to make written report, in a book kept in the office of the company for that purpose, of the condition of his engine, particularly specifying what, if any, corrections or additions were needed. This witness had on former occasions when the pins were missing included such fact in his report, and the pins were thereupon renewed, so that there can be no doubt that the engineer, as well as defendant company, understood the requirement in the regulation to cover the absence of pins. In this instance the engineer admittedly failed to report the fact that the pins were out. On the witness stand he appealed from his own uncertain recollection to the books containing his report, and, this being produced, showed that he made no report with respect to the absence of the pins. In passing upon the question of the defendant's negligence in connection with this accident, it is manifest that the promoting and proximate cause is to be found in the failure of the engineer to report the defect in the engine. Accepting this as the act of negligence, if responsibility attach to the defendant therefor, it must be because either the duty the company required of the engineer to report was a nondelegable duty, or the engineer in connection with such duty was not a fellow servant with the plaintiff. One or the other of these positions must be established in order to justify recovery.

While this duty of inspecting and reporting the condition of the engine was of first importance, it was yet a very simple thing, at least so far as it related to such apparent and obvious defects as the one which caused this accident, and we are concerned with no other, the question being whether with respect to this particular matter the company had a right to rely upon the vigilance and faithfulness of its engineer, and act accordingly. It was a duty requiring no special skill or experience. Whether the pins were in place or not could be ascertained by one man as well as another with no better eyesight. Faithfulness and attention were the only qualifications, and certainly no reason can be suggested why this should not be expected of one to whom was intrusted the more exacting and responsible duty of running the engine and to whom its care was intrusted. From any point of view, it would seem a very proper requirement, and one likely



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to promote in a very direct way the general safety of employees and others, and quite as efficient as any that would be reasonable and practicable. Moreover, the duty thus cast upon the engineer was incidental to his duty in the use of the engine in the common employment. And this circumstance denotes a distinction that differentiates cases such as this from those which hold under the general rule that the party to whom the employer commits the duty of maintaining the appliances used in a reasonably safe condition is the latter's agent and representative. We find this distinction nowhere better defined than in the case of *Steamship Company v. Ingebregsten*, 57 N. J. Law 400, 31 Atl. 619. It is there said: "On this topic a rational distinction would seem to be that, when the employee's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow servant, and the master is not responsible to his fellow servant for his fault; but that, of the master has cast a duty of inspection or repair upon an employee who is not engaged in using the apparatus in the common employment with his fellow servant, then that employee in that duty represents the master, and the master is chargeable with his default." Our own cases are in line with the authority quoted. In *P. & R. R. Co. v. Hughes*, 119 Pa. 301, 13 Atl. 286, it is said: "If, however, the company employ competent and skillful persons for the purpose of inspection, and affords them reasonable opportunities and facilities for the work under proper instructions, the company will not ordinarily be liable for the negligent performance of the work by their employees to a fellow employee unless the company knew, or by ordinary diligence ought to have known, of the defective manner in which the inspection was conducted."

Were the plaintiff and the engineer engaged in the common employment? An engineer's duties involve more than simply applying and regulating the motive power of his engine. The engine is under his care so long as he is in charge of it. He is expected to observe its workings, see that it is supplied with those things necessary to maintain its efficiency, such as fuel and oil, and keep its several parts in place and in good condition so far as he may. Without any prescribed order or regulation, it would be a duty incident to his position to report any derangement or weakening of machinery which he himself could not at once correct. In this case the engineer knew that the pins were out of place; that they had been removed for a temporary purpose, if not by his own act, with his approval. Clearly his duty required that he replace them or report the fact. His duty so to do was incidental to the common employment. The plaintiff's duty was auxiliary and supplementary to that of the engineer in the common work of maintaining the efficiency of the engine. His part was to clean the fire box and smoke-stack, to the same end that it was required of the engineer to see that the other parts of the machinery were kept in good

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working order. Their work was co-operative, within the same circle of appointment, and it is impossible to regard them as other than fellow servants.

The defendant's seventh point asked for binding instructions in favor of the defendant. This point was refused, and its refusal is the subject of the sixth assignment of error. This assignment of error is sustained.

The judgment is reversed.

**HAIRSTON v. UNITED STATES LEATHER CO. *et al.***

(Supreme Court of North Carolina, Dec. 22, 1906.)

[55 S. E. Rep. 847.]

**Master and Servant—Defective Appliances—Injury to Servant.**—An owner of an industrial plant used in connection therewith a railroad about 14 miles in length, on which it operated with its own crew engines and cars belonging to it, and railroad cars of others. The track was situated on a level bottom in and around the plant, and there would have been no difficulty in procuring automatic coupling devices. Held, that the failure to equip the cars with automatic couplers was negligence.

**Same—Defenses—Assumption of Risk—Contributory Negligence.\***—Where the proximate cause of an injury to an employee was the employer's negligent failure to equip its cars with automatic couplers, the defenses of assumption of risk and contributory negligence were not availing unless the conduct of the employee amounted to recklessness.

**Same—Negligence of Fellow Servants—Defense—Availability—Statutes.†**—Fellow Servant Act (Revisal 1905, § 2646), giving an employee of a railroad company suffering injury in the course of his employment in consequence of the negligence of a fellow servant, a right of action therefor, applies to a manufacturer operating in connection with its plant a railroad about 14 miles in length, on which its cars and engines are operated with its own crew, and an employee's right of action for injuries received while operating the cars is not defeated when the injuries were sustained by the negligence of a fellow servant.

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\*For the authorities in this series on the subject of the effect of the contributory negligence of, or assumption of risk by, the injured servant on the right to recover under an employers' liability act for his injury or death, see foot-notes appended to Indianapolis St. Ry. Co. v. Kane (Ind.), 23 R. R. R. 151, 46 Am. & Eng. R. Cas., N. S., 151; Pittsburgh, etc., Ry. Co. v. Ross (Ind.), 23 R. R. R. 160, 46 Am. & Eng. R. Cas., N. S., 160.

†For the authorities in this series on the subject of the application of employers' liability acts, see foot-notes appended to Pittsburgh, etc., Ry. Co. v. Lightheiser (Ind.), 22 R. R. R. 130, 45 Am. & Eng. R. Cas., N. S., 130; foot-notes appended to Southern Ry. Co. v. Simmons (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572.

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**Appeal—Immaterial Rulings.**—Where, in an action for injuries to an employee, the defenses of assumption of risk, including the negligence of a fellow servant, and contributory negligence, were eliminated, exceptions addressed to questions involved in such defenses were immaterial.

**Master and Servant—Injury to Servant—Assumption of Risk—Contributory Negligence.**—The rule that an action by an employee for injuries sustained by the employer's negligence in failing to equip its cars with automatic couplers, cannot be defeated by the defenses of assumption of risk, including the negligence of a fellow servant, and of contributory negligence, applies only to the protection of an employee wrongfully injured in the course of his employment.

**Trial—Submission of Issues.**—Where, in an action for injuries to an employee alleged to have been received by the employer's failure to equip its cars with automatic couplers, the evidence was conflicting on the question whether the employee was injured in the course of his employment, or while he was acting in disobedience to the orders of his superiors, the court properly submitted the issue as a separate question.

Appeal from Superior Court, Buncombe County; O. H. Allen, Judge.

Action by Luther Hairston against the United States Leather Company and Old Fort Extract Works. From a judgment for plaintiff, defendants appeal. Affirmed.

There was allegation and evidence on part of plaintiff tending to show: That defendant, a corporation engaged in the business of manufacturing leather and extracting tannic acid, in aid of and as a part of its enterprise, had constructed and was using 12 to 14 miles of railroad track, standard gauge, in and around its plant at Old Fort, N. C., and in operating this road, had its own crew, engines, cars, etc., and also used and shifted the railroad cars of other roads on which wood required for its purposes was brought to its plant. This wood was brought from various localities in railroad cars, and these cars were placed by the railroad on its side track, where the engines and crew of defendant company would move them onto the tracks of defendant, where they were unloaded, and the wood stacked between these tracks of defendant company, from which point the railroad crew afterwards, and as required, would load the wood on to its own cars, and haul same to points accessible and convenient to the chipper house where the machines of defendant company cut the wood up. Where the tracks permitted, by reason of being on an incline, the shifting of cars was sometimes done by hand, and especially was this true in pushing the cars from chipper house track into the chipper house yard, and up to the machines. That the cars of defendant were smaller than the railroad cars, being something like 18 feet in length, and not so high, and were without automatic couplers, the old style by link and pin being used for the purpose. That plaintiff was an

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employee of defendant company, whose duties called on him to work at the chipper machines, and, in the course and scope of his duties, he was called on frequently to move these cars and stop them, and couple and uncouple same; and on the occasion referred to, to wit, May 2, 1904, in the course of his duty, he was on a car which he had started, and was letting it roll down towards another car to which it was to be coupled. While plaintiff was so engaged, and as he was about to couple the cars he was on to another, the pin which had been prepared failed to drop properly so as to effect the coupling, but fell to the ground between the cars. That plaintiff, remaining on the car, got down on his all fours, and was reaching down to pick up the pin, when a co-employee on the third car allowed same to roll down against the car he was on, jolting plaintiff's hand between the drawheads where it was mashed, and severely injured. That this employee, one Will Caldwell, could have seen how plaintiff was engaged at the time, there being no obstruction, and plaintiff being in full view.

Plaintiff claimed that on these facts, if established, defendant was guilty of actionable negligence: (1) In not providing the cars with coupling devices, as required by law. (2) In negligently causing the violent collision between the cars as above set forth, while plaintiff was in plain view of those in control of the car which ran into the one plaintiff was on. Admitting that the cars were without automatic couplers, defendant denied that there was any negligence on its own part, and claimed that it was no part of plaintiff's duties either to couple or uncouple cars, but that his duty was to work at the chipper machines, and alleged contributory negligence on part of plaintiff. Further, that plaintiff had assumed the risk of the injury which occurred to him, and that he was injured by the negligence of a fellow servant in charge of the rear car, etc.

Defendant offered testimony to sustain his positions, and tendered issues as follows: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? (2) Was the plaintiff, at the time he received the alleged injuries, acting in disobedience of the orders of the defendant given to him by his foreman, J. Y. Allison? (3) Did the plaintiff contribute to his injury by his own negligence? (4) Was the plaintiff injured by the negligence of a fellow servant? (5) Did the plaintiff assume the risk of an injury when he undertook to couple the cars outside of his regular duty? (6) Is the plaintiff entitled to recover damages, and if so, what sum?"

The court submitted the following issues which were responded to by the jury as follows: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes. (2) Was the plaintiff, at the time he received the alleged injuries, acting in disobedience of the orders of the defendant given to him by his foreman, J. Y. Allison? Answer: No. (3) Is the plaintiff entitled to recover damages, and if so, what sum? Answer: \$1,000."

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There was judgment on the verdict for plaintiff, and defendants excepted and appealed.

*Merrimon & Merrimon*, for appellants.

*Locke Craig*, for appellee.

HOKE, J. (after stating the case). In the cases of *Greenlee* and *Troxler*, both being actions to recover for injuries inflicted on employees by the negligent failure of railroad companies to furnish their cars with automatic couplers, the principle was announced that such a failure would amount to continuing negligence on the part of the companies which would shut off the defense of contributory negligence and assumption of risk.

In *Greenlee's Case*, reported in 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, it was held: (a) "The failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence per se, continuing up to the time of an injury received by an employee in coupling the cars by hand for which the company is liable whether such employee contributed to such injury by its own negligence or not. (b) The former decisions of this court touching upon the duties of railroads to provide modern appliances by coupling cars otherwise than by hand and foreshadowing the early holding that the failure to do so would be negligence per se, and the act of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring self-couplers to be placed on all cars by January 1, 1898, and the general adoption by railroads of such self-couplers, made it the duty of defendant to adopt such devices, and its failure to do so, whereby an employee was injured, was negligence per se. (c) The fact that an employee remains in the service of a railroad company, knowing that its freight cars are not equipped with self-couplers, does not excuse the railroad from liability to such employee if injured while coupling its cars by hand, the doctrine of 'assumption of risk' having no application where the law requires the use of new appliances to secure the safety of employees and the employee, being either ignorant of the law's requirement, or expecting daily compliance with it, continues in the service with the old appliances."

In *Troxler's Case* it was held: "(1) Reason, justice, and humanity, principles of the common law, irrespective of congressional enactment, and Interstate Commerce Commission regulation, require the employer to furnish to the employee safe modern appliances with which to work, in place of antiquated, dangerous implements, hazardous to life and limb, and the failure to do so, upon injury ensuing to the employee, is culpable, continuing negligence on the part of the employer, which cuts off the defense of contributory negligence and negligence of a fellow servant—such failure being the causa causans. (2) It is negligence per se in any railroad company to cause one of its employees to risk his life and limb in making couplings which

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can be made automatically without risk." 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580.

In *Hicks v. Manufacturing Co.*, 138 N. C. 331, 50 S. E. 703, it was said that both of these cases were approved; and further, that the principle therein announced would be further applied in cases of like peril and circumstances, and we think it should be applied here. The defendant company, being a large industrial plant, in connection therewith, and as part of same, has constructed and owns, in and around its plant at Old Fort, N. C., 12 to 14 miles of railroad track, standard gauge, on which it operates with its own crew, engines, and cars, and also the railroad cars of other companies carrying to that point the material required for its purpose. It is an enterprise of unusual extent and proportions, no doubt doing more hauling than many of the logging roads, which have been held as railroads under our decisions, and more shifting and coupling and uncoupling of cars than would be done on the same or much greater quantity of mileage in the operation of a regular railroad. The track being situated on a level bottom in and around its plant, there would seem to be no difficulty in the procurement and use of these coupling devices at comparatively small cost by means of which these cars could be coupled automatically, and without risk; and the judge below was correct in charging the jury that the failure on the part of the company to equip its cars with automatic couplers was negligence, and that if such failure was the proximate cause of plaintiff's injury they would answer the first issue, "Yes."

The jury, under the charge, having found this issue against the defendant under the principles established in the *Greenlee* and *Troxler* Cases, both the defenses of assumption of risk, which ordinarily includes the negligence of a fellow employee, and that of contributory negligence are closed to defendant, and any issues addressed to these questions become immaterial and irrelevant unless perhaps the negligent conduct of the injured employee should amount to recklessness. Again, we have held at the present term, in *Bird v. Leather Co.*, 55 S. E. 727, that the act known as the "Fellow Servant Act," being Revisal 1905, § 2646, applies to the railroad of defendant company, citing *Hemphill v. Lumber Co.*, 141 N. C. 487, 54 S. E. 420. This statute, among other things, enacts that any employee of a railroad who is injured in the course of his service or employment by the negligence of a fellow servant, or by reason of any defect in the machinery, ways, or appliances of the company shall be entitled to maintain an action, and that any contract of an employer, express or implied, to waive the benefit of this section shall be void. This statute, in express terms, shuts off the defense of injury by negligence of a fellow servant, which was formerly open to defendant. And in *Coley's Case*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, it was held that in cases where same applied, it barred all defenses by reason of assumption of risk unless the "apparent danger was so great that its as-



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sumption amounted to reckless indifference to probable consequences." There was no recklessness here, nor was there any evidence tending to establish it. On the contrary, the plaintiff appears to have been doing as well as could be done with the appliances given him; and he testified that if he had gotten down on the ground and under the car to pick up the pin, his injury, in all probability, would have been much more serious. These two defenses, then, being withdrawn from defendant, both under the decisions in Greenlee and Troxler and by the construction put upon the statute in Coley's Case, *supra*, the numerous exceptions addressed to these questions become immaterial, and the only defense open to defendant on the facts presented was whether plaintiff was injured in the course of his service and employment.

The principles held to be controlling in this case, both in the decisions and by the statute, apply only for the protection of employees who are wrongfully injured in the course of their employment. If this plaintiff went out of the line of his service and employment, and in disobedience to the orders of his superior, officiously undertook to couple and uncouple cars, when it was no part of his duty to do so; in that event, both of these defenses would be open to defendant, and a different rule of responsibility would attach. The evidence was conflicting on this question; that of the plaintiff tending to show that plaintiff, at the time of the injury, was acting in the course of his employment; on the part of defendant, that plaintiff was acting out of the line of his duty, in disobedience to the express orders of his foreman. The court very properly submitted a separate issue as to this matter, and under a charge as favorable as defendant could expect, or had any right to ask, the jury have decided the question in favor of plaintiff, and this being true, under the principles discussed, and on the testimony, the plaintiff has a clear right of action.

There is nothing here said which conflicts in any way with the case of Elmore v. Railway, 132 N. C. 865, 44 S. E. 620. In that case, the court, in sustaining a recovery had by plaintiff in the court below, where a defendant had negligently failed to keep its cars supplied with automatic couplers which would work, held that the charge of the trial judge was sufficiently favorable to defendant—the same being as follows: "If plaintiff knew that the coupler was out of order, and that it was too dangerous to go between the cars to couple, and that plaintiff used his foot to make the coupling, and that, by reason of his position, he acted foolishly and without prudence with reference to the character of the work, and that this act was carelessness, the chances of safety being less in favor of him than against him, he would be guilty of contributory negligence, even if defendant knew of the defective condition of the coupler." 132 N. C. 865, 44 S. E. 620. As said by the court, this is sufficiently favorable to the defendant, for it is the rule which applies in ordinary cases of contributory negligence and assumption of risk. Hin-

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shaw v. Railroad, 118 N. C. 1047, 24 S. E. 426. But in cases like the present, involving the principles established by the cases of Greenlee and Troxler and Coley's Case, where same applies, the correct rule is held to be as indicated in this opinion.

There is no error, and the judgment below is affirmed.

No error.

**RUSSELL v. OREGON SHORT LINE R. Co.**

(Circuit Court of Appeals, Ninth Circuit, May 6, 1907.)

[155 Fed. Rep. 22.]

**Trial—Direction of Verdict—Questions of Negligence.**—While questions of negligence are ordinarily for the jury in federal courts, a case may be withdrawn from the jury and a verdict directed for plaintiff or defendant, as may be proper, where there is no conflict in the evidence, or where it is so conclusive in its character that the court, in the exercise of its sound judicial discretion, would be obliged to set aside a verdict rendered in opposition to such evidence.

**Master and Servant—Temporary Suspension of Relation—Departure by Servant from Service of Master.\***—Plaintiff's intestate, who was a bridge foreman on defendant's railroad, living at the time in an outfit car on a siding, went with his family on a velocipede car one afternoon to a spur track some 2½ miles distant, near which his father-in-law resided. The car was returned, and in the evening about 7 o'clock some of the men by his direction came after him with a hand car. He was then at his father-in-law's house, where he had been visiting since 5 o'clock, by which time his business for the defendant at the spur, if any, had been finished. About 8:30 he started back with the men, having no light on the car, and while on the way was killed in a collision with a meeting special train. Held, that at the time he was engaged on his own private affairs, and no relation of master and servant existed between him and defendant which brought him within the terms of a state statute making railroad companies liable for injuries to their employees caused by negligence of their fellow servants.

**Railroads—Injury to Person on Track—Contributory Negligence.**—A bridge foreman on a railroad, familiar with the operation of trains thereon, and knowing that special trains were liable to run at any

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\*For the authorities in this series on the question, who are, and are not, employees of a railroad company, see foot-notes appended to Parrott v. Chicago Great Western Ry. Co. (Iowa), 16 R. R. R. 253, 39 Am. & Eng. R. Cas., N. S., 253, where all the preceding authorities in this series on the subject are collected; foot-notes appended to Louisville, etc., Ry. Co. v. Illinois Cent. R. Co. (Ky.), 22 R. R. R. 653, 45 Am. & Eng. R. Cas., N. S., 653; foot-notes appended to Atchison, etc., Ry. Co. v. Fronk (Kan.), 22 R. R. R. 95, 45 Am. & Eng. R. Cas., N. S., 95; Shannon v. Union R. Co. (R. I.), 22 R. R. R. 80, 45 Am. & Eng. R. Cas., N. S., 80; foot-notes appended to Alabama Great So. R. Co. v. Burks (Ala.), 21 R. R. R. 562, 44 Am. & Eng. R. Cas., N. S., 562.

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time, who, while not in the performance of any duty for the company, but in the pursuit of his own affairs, went upon the track at night on a hand car showing no light and was killed in a collision with a special train at a distance from any crossing, was guilty of contributory negligence, and there can be no recovery from the company for his death, even conceding that the train was negligently operated, where such negligence was not willful nor wanton, and the presence of the hand car approaching on the track was not known to the engineer until the collision occurred.

In Error to the Circuit Court of the United States for the District of Idaho.

*Will R. King*, for plaintiff in error.

*F. S. Dietrich*, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. The plaintiff, Frances B. Russell, as administratrix of the estate of P. J. Russell, deceased, brought this action against the Oregon Short Line Railroad Company, defendant, to recover a judgment for damages for the death of her husband, which occurred on the evening of December 3, 1903. Defendant denied negligence, set up contributory negligence, and that deceased was engaged on his own private business when he was killed. The evidence showed substantially these facts: The deceased, P. J. Russell, was and had been for seven years a bridge foreman of the defendant railroad company. About the time of his death, the bridge gang of which he was foreman was engaged in work upon a bridge that was about two miles or more east of the town of Ontario, a place of 1,100 or 1,200 people. The bridge gang lived in what are called "outfit cars," which were moved from place to place as convenience required. These cars were kept on a side track at the stockyards, half a mile east of the town of Ontario. The deceased and his family lived in one of the outfit cars. Russell had been working in that vicinity about a month. Two miles west of Ontario, at a place spoken of as "Washoe Siding," there was a spur. On the afternoon of December 3, 1903, the deceased did not go to work where the bridge gang was employed; but at noon of that day, at the outfit cars, he told one of the men that he was going to Washoe, and requested him (Stroup by name) to come over after him after the work of the day was finished. The custom of the bridge gang was to stop work at 6 o'clock, and then to eat supper. Prior to the date of the accident Russell had tendered his resignation to the defendant company, but was not to leave the service of the road for a few days. Russell had bought a ranch near the Washoe Spur, and his intention was to give up railroading, and to live upon his farm. Mrs. Russell's father and family also lived at Washoe next to Mr. Russell's place, about a quarter of a mile from the spur. About 3 o'clock

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on the afternoon of December 3d, the deceased took his wife and children on a railroad velocipede from the outfit cars to the Washoe Spur. Upon their arrival at the spur, the velocipede was left near the track, but was afterwards taken back by a railroad employee, who had been at Russell's place that day. After leaving the spur, the Russells went over to the place owned by the deceased, and stayed there about half an hour. Mr. and Mrs. Russell were getting ready to move in a few days to the ranch. They spent the afternoon, principally, at Mrs. Russell's father's house. Mrs. Russell testified that while they were on the way to Washoe, or just before they started, her husband told her that he was going down there "to see about getting men to work, and to see about the spur that was there, and to see if there was room to set cars in." She said, too, that her husband was outside of her father's house part of the afternoon, and that he had told her he was going to see about employing a man named Burgess. The Burgess people lived on the same side of the track that her father did, near the track, between her father's house and the town of Ontario, about a quarter of a mile nearer to town than her father's place. It would have taken her husband about 10 minutes to walk from her father's place over to the Burgess house. Russell took supper with his father-in-law and family about 5 o'clock, and remained with the family from supper time until he left. Mrs. Russell says that she intended to return with Mr. Russell, but her children went to sleep, and she did not go back, and that they remained so long after supper "simply visiting" and "in social intercourse" with her people. At about 7 o'clock three men from the bridge gang voluntarily went down to Washoe upon an ordinary hand car for the purpose of getting Mr. Russell. They reached Mrs. Russell's father's house about 7:30. They did not start back until about an hour or an hour and one-half after they had reached Mrs. Russell's father's place, so that it was about half past 8 when Russell and the three men started eastward towards Ontario, where the outfit cars were. At a point approximately 3,800 feet west from the Ontario depot, an engine, drawing the general manager's special train of three passenger cars, came upon the hand car and the men. The speed of the hand car at the time was between five and eight miles an hour; it was making considerable noise. Russell was helping to pump the car. The speed of the special train is estimated by different witnesses for plaintiff at between 40 and 70 miles an hour. Some of the men on the hand car say they were looking ahead, but did not observe the special train until it was from 200 to 400 yards away, but could see the lights of the town of Ontario before they saw the train. There was no light of any kind on the hand car. There was then no headlight shining on the engine. Russell first called, "Stop! there is a train." The men stopped the hand car as quickly as possible, and endeavored to remove it from the track before the engine reached them. They lifted only one end of the hand car off the rail when the engine struck the other end,

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and threw Russell, who was trying to lift the hand car off, so injuring him that he died immediately. No one else was struck or hurt. The railroad track about this point was nearly straight for a distance of about two miles. The train had passed through the town of Ontario without a headlight, and without stopping, but it had whistled about a mile east of the town, and one of the men on the hand car says he heard a whistle just before the accident. Upon this point the witnesses do not wholly agree. The headlight on the engine was burning at Arcadia, the station east of Ontario six or seven miles, and the evidence tended to show that it was burning dimly at the first stopping place west of Ontario, three miles distant. It appeared that at that time the railroad company was gradually equipping its engines with electric headlights, and that the men found more or less difficulty in keeping the headlights burning constantly. Upon the night in question the fireman went out on the engine to fix the headlight, which had gone out, about the time the train approached the bridge east of Ontario. If it had been burning properly when the train approached Ontario, it could have been seen two miles away. There is a serious conflict in the testimony as to whether the engine had its "blizzard lights," which are oil lights on the front end of the engine, burning that night when the train went through Ontario. Plaintiff's witnesses say they did not see them; defendant's witnesses say they were burning and in good order, and could have been seen. The rules of the company forbade the use of hand cars, except in the line of duty. Hand cars at night were also required to display red lights to the rear. It appeared from plaintiff's evidence that it was the duty of men engaged in the bridge gang, and they were instructed, to be on guard all the time for extra trains, and that this was particularly true of men engaged in work upon bridges, as it was necessary for them to obstruct the track at various places in driving piles and otherwise repairing or constructing bridges. Russell's superior testified for defendant that it was not in the line of the bridge foreman's duty to observe spurs with a view of setting cars in, and that Russell had no business on behalf of the company at any place, except where the bridge gang was at work, but that he had authority to employ and discharge men. At the conclusion of the evidence introduced by both sides, the court granted the defendant's motion to direct a verdict, based upon the grounds, among others, that the deceased was guilty of contributory negligence, and that when he was killed he was a trespasser upon the railroad tracks. Judgment was entered for the defendant, and appeal was duly perfected.

The principal assignment of error by the plaintiff is that the Circuit Court erred in not submitting the question of negligence to the jury. Counsel devotes a considerable part of his brief and argument to the contention that the case presented a question of fact for the jury to determine, from all the circumstances, whether or not the defendant company had provided suitable appliances for its trains upon the night of the accident, and

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whether proper caution was used in running its special train through Ontario without a headlight, whether or not "marker" lights were on the engine, and whether defendant was or was not negligent in not having oil lamps at Ontario, so that, in case the electric lights went out, an oil lamp could be substituted. It is unnecessary to discuss the rule dwelt upon by counsel that ordinarily questions of negligence are for consideration by the jury, guided by proper instructions by the court as to the principles of law by which the jury should be controlled. That rule is so firmly established that it may be regarded as elementary. But it is also thoroughly well settled that a case may be withdrawn from the jury altogether and a verdict directed for plaintiff or defendant, as may be proper, where there is no dispute in the evidence, or where it is so conclusive in its character that the court, in the exercise of its sound judicial discretion, would be obliged to set a verdict rendered in opposition to such evidence. *Delaware, etc., Railroad v. Converse*, 139 U. S. 472, 11 Sup. Ct. 569, 35 L. Ed. 213. In *Schofield v. Chicago & St. Paul Railway Company*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224, Justice Blatchford, pronouncing the unanimous opinion of the Supreme Court, said:

"It is the settled law of this court that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Improvement Co. v. Munson*, 14 Wall. 442, 20 L. Ed. 867; *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780; *Herbert v. Butler*, 97 U. S. 319, 24 L. Ed. 958; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980; *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840; *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Anderson County Com'rs v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; *Baylis v. Travellers' Insurance Co.*, 113 U. S. 316, 5 Sup. Ct. 494, 28 L. Ed. 989."

Inasmuch, therefore, as the federal courts had authority, when this action was tried, to direct verdicts under certain conditions in negligence suits, we must inquire whether, in the present case, error was committed by the lower court in holding that, as a matter of law under the evidence, Russell was guilty of contributory negligence which barred recovery, whatever negligence there may have been on the part of the railroad company: There was substantial evidence of negligence on the part of defendant's engineer in running the train at a very high rate of speed through Ontario without a headlight. The engineer must have known his light was dim or out altogether, and he ought to have slowed down or stopped at Ontario and taken new lights, or repaired the one he had. It is highly probable that, if there had been a headlight shining before the train reached Ontario, some of the men on the hand car would have seen it, and the hand car could have been removed in time to have saved Russell's life. But



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the failure of the engineer to fix his headlight, or to slow down, or to get other lights at Ontario, did not impose liability upon the defendant for killing the deceased, unless plaintiff has shown that when deceased was struck he was acting in the line of his duty as a servant of the company, and that by reason of such relationship and action he was rightfully upon the track, and that, therefore, the defendant owed a duty to him of having a headlight burning, and of running its train at a slower rate of speed, and of having blizzard lights burning upon the engine. The most favorable view of the case from plaintiff's standpoint is that Russell took the velocipede car in the afternoon for two purposes—one, to see about setting cars in on the spur at Washoe; the other, to see about employing Burgess for the company. These were the only reasons given for the trip to Washoe. He reached the spur about half past three in the afternoon. Now, clearly, only a most casual observation was necessary to enable the deceased to see whether there were any cars already upon the spur, and whether the track was in condition to receive cars, if he wished to have any put there for convenience in connection with his bridge repair work. No assistance was needed to make this inspection; so no delays were required. Upon this branch of the case, therefore, we have no doubt at all that the only inference that can be drawn from the evidence is that Russell made such examination of the spur as he believed was necessary before half past 3, when he went with his family to his father-in-law's house. Passing, then, to the proposed employment of men, we find that Russell may have seen the man Burgess and talked with him about work. There is no evidence at all that he did go to Burgess' house, or did see him, except Mrs. Russell's statement of the intentions of her husband, as he told them to her before they reached Washoe. Burgess was not called and did not testify; nor was his absence from the trial explained in any way. But, conceding that Russell did go to see Burgess, and did see him about employment, it yet appears that Russell must have seen him in the afternoon before 5 o'clock, because Mrs. Russell positively testified that her husband ate supper with her at her father's at 5 o'clock, and that he remained with the family from that time until he left for the outfit cars—about eight o'clock or after in the night. So, from 5 to 8, or thereabouts, he was doing nothing for the railroad company, and was engaged purely in pursuits of his own affairs. Had Russell gone back to the outfit cars in the afternoon with the velocipede, as he could have, the accident would not have happened; but he preferred to stay for his own pleasure, and wait for the men who were coming down with the hand car after supper. It is undisputed that the men in the hand car reached the house of Mrs. Russell's family about 7 or shortly thereafter. Supper was over, and, as Russell's duties for the company had ended before 5 o'clock, there was nothing to prevent his immediate return with the men, and had he gone at once with them the accident could not have happened. Again he delayed his departure, and remained at

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Washoe for an hour or more visiting with his wife's family. When he finally started, he went without a light on the hand car. Under this evidence, the conclusion is certain that his act in remaining until 8:30 o'clock was his own, and that, in returning when and in the manner he did on the hand car, he was acting for himself. His conduct was no part, whatever, of any business relation of master and servant. It must be held, therefore, as a matter of law, that his attitude became that of a servant who voluntarily stepped wholly aside from the business of the master to do his own pleasure exclusively. Under such conditions, the master is not liable for the servant's death.

In *St. Louis Southwestern Ry. Co. v. Harvey*, 144 Fed. 806, 75 C. C. A. 536, the Court of Appeals of the Eighth Circuit said:

" \* \* \* For if a servant step aside from the business of his master for never so short a time to do any act that is not a part of that business, the relation of master and servant is for the time suspended, and the acts of the servant during that interval are not his master's but his own. *Benson v. Chicago, St. P., M. & O. Ry. Co.*, 78 Minn. 303, 307, 308, 80 N. W. 1050; *Baker v. Kinsey*, 38 Cal. 631, 633, 99 Am. Dec. 438; *Georgia Railroad Co. v. Wood*, 94 Ga. 126, 21 S. E. 288, 47 Am. St. Rep. 146.

"Nor does the fact that servants guilty of a tortious act make use of the master's cars, engines, or other facilities, which they could not have obtained in the absence of the relation of master and servant, to commit it, while pursuing their own ends exclusively, charge the master with liability for their act, in the absence of his knowledge or consent to such use. *Chicago, St. P., M. O. Ry. Co. v. Bryant*, 65 Fed. 969, 973-975, 13 C. C. A. 249, 253-255."

The court cites numerous decisions to sustain the rule which controlled. *Cousins v. Railway Co.*, 66 Mo. 572; *Morier v. Railway Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; *Campbell v. City of Providence*, 9 R. I. 262; *Garretzen v. Duencel*, 50 Mo. 104, 11 Am. Rep. 405; *Chicago Consol. Bottling Co. v. McGinnis*, 86 Ill. App. 38; *Snyder v. Railway Co.*, 60 Mo. 413. To this list may be added *Shadoans, Adm'r, v. C. N. O. & T. P. R. Co.*, 82 S. W. 567, 26 Ky. Law Rep. 828, where it was held that where a brakeman on a freight train went into the cab of the locomotive of another train to get a drink of water, and, while there for that purpose, the two trains collided and he was killed, there could be no recovery, though the collision was due to the negligence of the railroad's servants, deceased not being in the discharge of any duty to the master.

Again, as deceased was not doing duty for the company, but was pursuing his own affairs only at the time of his death, he was not in that relationship of fellow service with the engineer or operatives of the special train which enables his administratrix to recover, relying upon the fellow servant statute of the state of Oregon, approved February 10, 1903, entitled "An act imposing upon railroad corporations liability for injury to their em-

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ployees in certain cases." In *Railroad Co. v. Wade*, 35 South. 863, 46 Fla. 197, a wife sued for damages for the death of her husband. The deceased was killed near the eastern boundary of a village in a collision between a hand car and a locomotive. In that case the facts showed that the engine was being run backwards in the night, and it was contended that it did not have proper lights and was running at an unusual rate of speed. The deceased in that case was employed as a member of a bridge gang, but had been discharged for the day, and had borrowed the hand car he was upon from the foreman of the crew of which he was a member. But the court held that there could be no recovery, basing its decision upon the ground that the deceased at the time of the accident was not on duty, and was not a fellow servant with the trainmen, and that no relationship of master and servant existed.

In conformity with the views expressed, our opinion is that the relationship of master and servant, and that of fellow servants, and the legal principles applicable thereto, are without the case, and that consequently the action resolves itself into the ordinary one where a plaintiff seeks to recover damages for the death of a person, resulting from the fault or negligence of another. Judged from this standpoint, under firmly established principles, the plaintiff must fail, for the reason that the undisputed evidence permits of no deduction other than that deceased was guilty of fault which directly contributed to the accident which resulted in his death. A railroad company must necessarily have an exclusive right to use its tracks (subject to certain legal rights of the public at crossings), and cannot ordinarily be held responsible for a failure of its engineers to anticipate that at night, between stations and away from crossings, there are persons using hand cars upon the rails without signals of any kind. Conceding that the company in this case was negligent in some respects, as heretofore stated, nevertheless its train was lawfully upon its tracks when deceased was killed; while the deceased was negligent in using the tracks at all by going voluntarily upon them in the night, for his own business, with a hand car, and without a light. His situation was one of great peril, which carried with it all risk of safety. He ought to have used the utmost vigilance to protect himself against possible approaching trains. He was familiar with railroads, and, as a bridge foreman, knew that a special train might come very unexpectedly. *Northern Pacific Railway Co. v. Jones*, 144 Fed. 47, 75 C. C. A. 205.

Appellant makes the point that even if deceased was guilty of negligence, still that such negligence should not prevent recovery if it was shown that the defendant company might, by the exercise of reasonable care and prudence, have avoided the consequences of the negligence of the deceased. *Inland Seaboard Coasting Company v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, and *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, are cited to sustain this ar-

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gument. The facts of the present case, however, render these citations inapplicable, for it was thoroughly well established on the trial that the defendant's servants in charge of the special train not only could not have anticipated that the deceased was upon the track at the point where he was killed, and in a dangerous position, but that they could not by any possible exertion have avoided the injury to the deceased after his danger was discovered. There is no question of wanton or willful negligence involved. Indeed, the engineer knew nothing at all of any danger until the collision occurred. In *Northern Pacific Railway Co. v. Jones*, *supra*, speaking through Judge Gilbert, this court pointed out that the doctrine laid down in *Inland & Seaboard Coasting Company v. Tolson* was applicable where the agents of the defendant knew of the presence of the injured person, and where there appeared to be reason to believe that such person was not able to avoid injury or danger; but it was distinctly held that neither of the cases just cited "intended to lay down the broad rule that no contributory negligence of the party injured will defeat his right to recover if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of negligence." Nor are cases involving the duty of a railroad company at a public road crossing pertinent, as the collision where deceased was killed occurred a considerable distance west of any road or crossing.

Our conclusion upon the whole case is that the court was right in directing a verdict, and that judgment must be affirmed.

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**BONEY, v. ATLANTIC & N. C. R. Co.**

(Supreme Court of North Carolina, Oct 16, 1907.)

[58 S. E. Rep. 1082.]

**Master and Servant—Master's Liability for Injury to Servant—Assumption of Risk—Statutory Provision.**—Under Revisal 1905, § 2646, denying the defense of assumption of risk when an employee is injured by any defect in machinery, a non-suit in an action by a servant for injuries resulting from a defective handcar on which he was riding is properly refused.

**Same—Notice to Master.\***—Where a servant who was injured while riding on a defective hand car had repeatedly reported it to his superior as defective, and the superior had promised to furnish another, but had failed to do so, there was no assumption of risk.

**Same—Actions—Sufficiency of Evidence.**—In an action by a servant for injuries received while riding on a defective hand car, evidence

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\*See second foot-note appended to *Cincinnati, etc., Ry. Co. v. Robertson*, (C. C. A.), 17 R. R. R. 324, 40 Am. & Eng. R. Cas., N. S., 324.

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considered, and held to sustain a finding against contributory negligence.

**Same—Contributory Negligence—Proximate Cause.**—Contributory negligence to bar a recovery must be shown to be the proximate cause of the injury.

**Damages—Personal Injuries—Questions for Jury—Amount of Damages.**—In a personal injury action, the amount of damages is a question for the jury.

**New Trial—Grounds—Excessive Damages.**—If the verdict is for excessive damages, the court has power to set it aside.

**Appeal and Error—Review—Discretion of Lower Court—Excessive Verdict.**—A refusal of the trial court to set aside a verdict as excessive is not reviewable.

Walker, J., dissenting.

Appeal from Superior Court, Lenoir County; Long, Judge.

Action by H. F. Boney against the Atlantic & North Carolina Railroad Company. Judgment for plaintiff and defendant appeals. Affirmed.

*Rouse & Land* and *L. I. Moore*, for appellant.

*G. V. Cowper* and *Loftin & Varser*, for appellee.

CLARKE, C. J. The plaintiff was injured in consequence of using a defective hand car, whose defects he had repeatedly reported to his superior, who had promised to furnish another hand car, but had failed to do so. The nonsuit was properly refused, both because of the fellow servant law (Revisal 1905, § 2646), which denies the defense of assumption of risk when an employee is injured "by any defect in the machinery, ways and appliances of the company" (*Coley v. Railroad*, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817), and, even independently of that statute, because the plaintiff had reported the defective hand car to his superior, and had been promised another one (*Labatt, Master & Servant*, p. 86 [b], and section 423, p. 1193).

The defendant relied on the defense of contributory negligence, but that issue was found in favor of the plaintiff. The acts complained of were that the plaintiff, in charge of the hand car, was standing up, helping his men work the lever up and down running the car, and, looking back, saw the train six miles off, and about this time the hand car flew the track, solely from the defect, previously reported, in its running gear. The rules of the company required the hand car to be taken off 20 minutes before the train passed. It is not clear whether the accident occurred 20 minutes before the train passed or not, but there was no casual connection between the passage of the train and the injury, and the jury so found. It may be that the court might well have instructed the jury that, if they believed the evidence, to find the issue of contributory negligence in the negative. Certainly the defendant has no cause of complaint, for the court gave the instructions asked by the defendant with

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the proper modification that, if the conduct of the plaintiff should be found as stated in the defendant's prayers and was the proximate cause of the injury to answer the issue of contributory negligence, "Yes," otherwise, "No." Negligence to bar a recovery must be shown to be the proximate cause of the injury. *Baker v. Railroad*, 118 N. C. 102, 24 S. E. 415; *Reemsbottom v. Railroad*, 138 N. C. 38, 50 S. E. 448, cited and affirmed *Allen v. Railroad* (at this term) 58 S. E. 1081. The charge as to quantum of damages follows that approved in *Wallace v. Railroad*, 104 N. C. 452, 10 S. E. 552, and recently in *Ruffin v. Railroad*, 142 N. C. 129, 55 S. E. 86.

The amount of damages was a matter of fact, of which the jury were the judges. If their finding was excessive, his honor, who heard the evidence, had the corrective power to set it aside. His refusal to do so is not reviewable by us. This is well settled by numerous decisions of this court. *Norton v. Railroad*, 122 N. C. 937, 29 S. E. 886, and cases there cited. There are states under the wording of whose Constitutions the appellate court can review the question of excessive damages, and it may not be improper to say that in those courts verdicts for damages for wrongful death and for personal injuries sustained by employees and others by reason of negligence in operating railroads, much greater in amount than those ordinarily returned by juries in cases coming up to this court, have been sustained as not excessive.

No error.

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**DE WOLFF v. ADAMS EXPRESS CO.**

(Court of Appeals of Maryland, Nov. 13, 1907.)

[67 Atl. Rep. 1099.]

**Carriers—Bill of Lading—Express Receipt—Value—Limited Liability.\***—Where an express receipt provided that the rate was based on the value of the property, which must be declared by the shipper, a provision that unless a greater value was declared the shipper agreed that the value of the property was not more than \$50, and that the carrier should not be liable for a greater amount, was not objectionable as limiting the carrier's liability for negligence, but was reasonable and binding on the shipper.

**Same—Knowledge—Presumption—Contract.†**—Where a bill of lad-

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\*See foot-notes appended to *Southern Express Co. v. Stevenson* (Miss.), 23 R. R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547.

†For the authorities in this series on the question whether the shipper's mere acceptance of a contract of shipment includes his assent to its printed conditions, see foot-notes appended to *Singer v. Merchant's Despatch Transp. Co.* (Mass.), 24 R. R. R. 83, 47 Am. & Eng. R. Cas., N. S., 83; *Allen & Gilbert-Ramaker Co. v. Canadian Pac. Ry. Co.* (Wash.), 24 R. R. R. 75, 47 Am. & Eng. R. Cas., N. S., 75; foot-notes appended to *Hayes v. Adams Express Co.* (N. J.), 23 R. R. R. 506, 46 Am. & Eng. R. Cas., N. S., 506.



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ing delivered by a carrier to a shipper is accepted by him, he is presumed, though he did not sign it, to have read and acquiesced in its provisions which therefore constitute a contract of carriage, in the absence of fraud, imposition, or mistake.

Appeal from Baltimore City Court; Henry Stockbridge, Judge.

Action by Samuel De Wolff against the Adams Express Company. From a judgment for plaintiff for less than the relief demanded, he appeals. Affirmed.

Argued before BOYD, ROGERS, BURKE, and SCHMUCKER, JJ.

*Eli Frank and Thomas C. Weeks*, for appellant.

*William S. Thomas*, for appellee.

SCHMUCKER, J. The appellant in this case sued the appellee to recover the value of two diamond rings received by it in New York for transportation to Baltimore, but lost in transit, and never delivered to the consignee. The declaration charged the defendant with the loss of the rings through its own negligence, or that of its servants or agents, but contained no allegations of fraud or illegal conversion. The express company, in addition to the general issue pleas, set up by special pleas that it had undertaken to carry the rings only under the special contract, to be hereafter mentioned, by which the value of the rings had been fixed at \$50, and that before the bringing of the suit it had tendered the plaintiff \$50 in liquidation of its liability under the contract, but he had refused to accept it. The case was tried before the court without a jury, and at the close of the evidence the court rejected the plaintiff's prayers and granted one offered by the defendant, declaring as matter of law that "under the pleadings and evidence in the case the limit of the plaintiff's recovery against the defendant is \$50." A verdict for that sum was thereupon rendered against the defendant, and judgment entered thereon, and the plaintiff appealed. One of the plaintiff's rejected prayers asserted the proposition that the receipt given by the company for the package containing the rings was not efficient in law to release it in whole or in part from its common-law liability as a common carrier for its own negligence or that of its agents or servants, even though the court sitting as a jury found that the receipt was accepted by the plaintiff's agent in New York at the time of the shipment of the goods. The other rejected prayer of the plaintiff fixed the measure of damages, in the event of a verdict in his favor, at the value of the rings. The record contains but one bill of exceptions, and that relates to the court's ruling on the prayers.

The following facts appear from an agreed statement of facts found in the record: On or about December 28, 1905, Henry McAleenan, a pawnbroker residing in New York City, shipped from that city to Baltimore by the Adams Express Company one small package consigned to the appellant. At the time of

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the shipment, the shipper did not disclose to the company the contents or value of the package, but, when he was asked by the company's agent what value he would place on the shipment, he stated no value, whereupon the agent delivered to him a receipt or bill of lading on which was stamped, "Value asked, and not given," and the shipment was accepted for transportation by the company, and the bill of lading was delivered to the shipper and accepted by him. The bill of lading is as follows: "The company's charge is based upon the value of the property, which must be declared by the shipper. (Nonnegotiable bill of lading.) Adams Express Company. 11 West 34th Street, New York. Dec. 28, 1905. Received from McAleenan one Pa. marked 'S. De Wolff, Baltimore, Md.,' valued at \$——, value asked and not given, which the company agrees to carry upon the following terms and conditions, to which the shipper agrees, and, as evidence thereof, accepts this bill of lading: (1) The consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated therein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein. Charges Coll. Liability limited to \$50, unless a greater value is declared. For the company: Moran." It was also agreed that the plaintiff could produce as a witness the shipper, McAleenan, who would testify that the package when shipped contained two diamond rings, valued at \$400. There is evidence in the record tending to prove that, according to the method pursued by the express company in fixing charges for transportation and handling shipments, if the true nature and value of the contents of the package containing the rings had been disclosed by the shipper at the time of shipment, the express charges would have been double what they were, and the package would, immediately upon its receipt, have been taken to the money department of the company's New York Office and handled on a jewelry waybill, and placed in a sealed jewelry trunk, and given in care of a special messenger in its transit to Baltimore, and there delivered in what is known as a "money delivery wagon" in an iron safe in charge of a guard in addition to the driver; and other special precautions involving greater expense would have been taken for its protection while in the custody of the company. By reason of the failure of the shipper to give, in response to the company's request, proper information as to the value of the package, it was handled while in the company's charge as a small package of ordinary merchandise, and came in due course of transit to the petty parcel room of the company in Baltimore, and there disappeared, and, although diligent search for it was made, it has never been found.

Under these circumstances, no error is to be found in the

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rulings of the learned judge below on the law of the case. It has several times been held by this court that a common carrier may lawfully restrict the amount of its common-law liability by a special contract just and reasonable in its nature. In *Brehme v. Dinsmore*, 25 Md. 328, the present appellee was sued for the value of a package which it undertook, by a contract, similar to the one now before us, to transport from New York to Baltimore, but failed to deliver at the latter place. In that case the package, when delivered by the shipper to the carrier, was in such form that its contents, consisting of light but costly goods, valued at \$675, were not visible, and were not disclosed to the express company, nor was any statement of their value given. The receipt or bill of lading given for the package by the express company contained a provision that in no event "shall the holder hereof demand beyond the sum of fifty dollars at which the article hereby forwarded is hereby valued, unless otherwise herein expressed or unless specially insured (by the company) and so specified in this receipt." In that case the court below, at the instance of the defendant, charged the jury that the receipt constituted a special contract between the parties for the carriage of the package binding upon both and that the plaintiff could only recover the sum, at which the package was valued in the receipt, with interest thereon. This court held that there was no error in the ruling, saying in the opinion: "The right of carriers to restrict their common-law liability by express contract is now too well settled to be any longer questioned. It is established by numerous decisions both in England and in this country, and rests upon the plainest and most obvious grounds of reason and justice. In *Dorr v. Steam Navigation Co.*, 11 N. Y. 485, 62 Am. Dec. 125, Judge Parker in a very able and satisfactory opinion, after citing numerous authorities, has laid down very clearly the reasons in support of this position, and, without repeating what has been so well said in that case, we think, if the question were a new one, it might safely rest upon the reasoning of Judge Parker in that case. \* \* \* The receipt executed by the appellee and accepted by the appellant constituted the contract between the parties, and both upon reason and authority they are bound by its terms." The right of a common carrier to restrict his ordinary responsibility by special contract was again recognized by this court in *B. & O. R. R. v. Brady*, 32 Md. 333, and *McCoy v. Erie & Western Transp. Co.*, 42 Md. 509, and in the *Casualty Ins. Co.'s Case*, 82 Md. 576, 34 Atl. 785, we said that in *Brehme v. Dinsmore*, *supra*, "the right was distinctly recognized and is undoubtedly now the law."

It is to be observed that the special provisions of the bill of lading in the present case do not attempt to change the nature of the carrier's liability. They only fix a pecuniary limit to it by agreeing upon the value of the property whose loss or injury might result in a claim against the carrier for damages. Up to the value of the property thus fixed by the parties themselves

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the carrier remains liable for negligence as fully as ever. It furthermore appears upon the face of the bill of lading that the company's charge for transporting the package was to be based upon the value of the property contained in it, which the shipper was permitted by the terms of the bill to declare, and that the valuation of \$50 was adopted, for the purposes of the contract made by the bill, simply because the shipper, who was the only one of the parties to the transaction who knew the contents of the package, failed to disclose their nature or more accurately fix their value when requested to do so. Such an agreement is neither unjust nor unreasonable. *Hart v. Penna. R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, is the leading federal case upon this subject, and it has frequently been relied on by the Supreme Court of the United States in more recent cases. That suit was brought to recover damages for the loss of five horses injured in transit under a bill of lading which stated that the transportation was undertaken "on the condition that the carrier assumes a liability on stock to the extent of the following agreed valuation: If horses or mules, not exceeding \$200 each; \* \* \* if a chartered car, on the stock and contents in the same, \$1,200 for the car load." The plaintiff claimed \$19,800 as the value of the horses, but the court sustained the defendant's objection to evidence of any greater value than \$1,200, and the verdict was for that amount. The plaintiff contended that the carrier could not lawfully fix an arbitrary limit to its liability for damages for its own negligence. The Supreme Court in their opinion say: "It is not asserted that the plaintiff named any value greater or less, otherwise than as he assented to the value named in the bill of lading by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The valuation named was the agreed valuation, the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was fixed on condition that such was the valuation and that the liability should go to that extent and no further. \* \* \* The limitation as to the value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. \* \* \* There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principle of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." The opinion concludes as follows: "The distinct ground of our decision in the case at bar is that where a contract of the kind signed by the shipper is fairly made, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the

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extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." In Hart's Case the shipper signed the bill of lading, but in Brehme's Case there was no other evidence of the shipper's assent to the terms of the bill of lading than that arising from his acceptance of it, and upon that ground it was strenuously insisted upon the plaintiff's brief in this court that the alleged special contract had not been proven, but our predecessors held that "the receipt executed by the appellee and accepted by the appellant [the shipper] constituted the contract between the parties," and that they were bound by its terms. A bill of lading delivered by the carrier to the shipper and accepted by him, although without his signature, is presumed to have been read and acquiesced in by the shipper, and to constitute the contract of carriage in the absence of fraud, imposition, or mistake. 6 Cyc. 417, 5 A. & E. Encycl. of Law, 293; Hutchinson on Carriers (3d Ed.) §§ 408, 309; *Cau v. Texas & Pac. R. Co.*, 194 U. S. 431, 24 Sup. Ct. 663, 48 L. Ed 1053. It is the duty of the shipper to inform the carrier of the real value of the goods transported, and, if he fails to do so when requested or by his silence assents to the value inserted by the carrier in the bill of lading, and thereby secures a lower rate of transportation, he ought not in our opinion to be permitted when the property has been lost, even through the carrier's negligence, to repudiate the value stated in the bill and recover damages in excess of it.

We are aware of the fact that there is some diversity of opinion among the courts of the different states upon the right of a common carrier to limit by any form of contract its liability for losses arising from its own negligence, but upon an examination of the cases the decided weight of authority will be found to be in harmony with the views which we have expressed.

The judgment appealed from must be affirmed.

Judgment affirmed, with costs.

SHAW *v.* CHICAGO, R. I. & P. Ry. Co.

(Supreme Court of Iowa, Oct. 24, 1907.)

[113 N. W. Rep. 478.]

**Carriers — Passengers — Tickets — Redemption — Place.\***—Under a statute requiring redemption of unused railroad tickets at the place of purchase, it was no defense that the person in charge of the office of purchase directed plaintiff to apply for redemption at a freight depot, the location of which did not appear.

Appeal from District Court, Polk County; Hugh Brennan, Judge.

“Not to be officially reported.”

Action at law under the statute to recover a penalty. Judgment for plaintiff, and defendant appeals. Affirmed.

*Carrol Wright, J. L. Parrish, and J. H. Johnson*, for appellant.  
*S. G. Mayer and L. A. Smyres*, for appellee.

PER CURIAM. Plaintiff bought a ticket at the depot ticket office of the defendant railway company in Des Moines, good for passage from Des Moines to Indianola. He used only a portion of such ticket, and within a day or two presented the unused portion to the person in charge of the depot ticket office and requested redemption, which was refused. These facts brought the case clearly within the rule of *Rohrig v. Railway*, 130 Iowa, 381, 106 N. W. 935. It is not material that plaintiff was directed by the person in charge of the ticket office to go elsewhere—to a freight depot, the location of which does not appear—to secure redemption. The statute says that redemption shall be made at the place of purchase.

The judgment was right, and it is affirmed.

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\*For the authorities in this series on the subject of the redemption of unused passenger tickets, see *Trezona v. Chicago G. W. Ry. Co.* (Iowa), 12 Am. & Eng. R. Cas., N. S., 104 (railroad not required under common law to redeem tickets); note appended to *Ft. Worth, etc., Ry. Co. v. Cushman* (Tex.), 14 Am. & Eng. R. Cas., N. S., 259 (statutory right to have unused portion of excursion ticket redeemed).



**BIRMINGHAM RY., LIGHT & POWER CO. v. McDONOUGH.**

(Supreme Court of Alabama, Nov. 21, 1907.)

[44 So. Rep. 960.]

**Carriers—Transportation of Passengers—Rules—Reasonableness.—**

A carrier of passengers has a common-law right to make reasonable rules for the conduct of its business.

**Same—Question for Court or Jury.**—The reasonableness of a given rule adopted by a carrier of passengers is, in an action for ejection, a question for the court.

**Same—Change of Street Cars by Passenger.\***—The rule of a street railway company operating motors and trailers as part of the same train with a conductor on each car, requiring each conductor to collect and register fares from all the passengers on his car, and prohibiting a passenger, who had paid fare on one of the cars of the train, from passing to the other without again paying his fare on that car, was reasonable and enforceable.

**Same—Ejection of Passenger—Action—Pleading.**—In an action for ejection of a street car passenger from a trailer for his refusal to pay fare on it after he had paid fare on the motor, a plea alleging a rule prohibiting passengers from riding on different cars of the same train without paying fare on each car was not objectionable for failure to show that reasonable accommodations were furnished plaintiff on the car on which he paid his fare; the carrier's failure to do so, if any, being matter for replication.

**Same—Knowledge of Rule.**—Where, after plaintiff had paid his fare on a motor car, and gone to the trailer, and refused the demand of the conductor of the trailer for a second fare, he was informed of the carrier's rule that passengers must pay fare on the car on which they ride, and that he might return to the motor before he was ejected, a plea alleging such matters was not objectionable for failure to aver that plaintiff had knowledge of the rule before he boarded the car from which he was ejected.

**Same—Enforcement of Rules.**—A carrier is responsible for an unjust application of a reasonable rule, or for enforcing it with undue severity.

**Same—Pleading—Special Plea.**—Where a violation of a carrier's rule is relied on as a defense to an action for ejection of a passenger, the rule must be brought forward by special plea.

**Appeal—Bill of Exceptions—Pleading.**—In the absence of a bill of exceptions, it cannot be determined on appeal whether defendant had the benefit under the general issue of the matter in a special plea to which a demurrer was erroneously sustained.

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\*For all the preceding authorities in this series on the subject of the validity of a carrier of passengers' rules and regulations, see foot-notes appended to *Illinois Cent. R. Co. v. Allen* (Ky.), 20 R. R. R. 49, 43 Am. & Eng. R. Cas., N. S., 49, where they are collected; *Knoxville Traction Co. v. Wilkerson* (Tenn.), 22 R. R. R. 763, 45 Am. & Eng. R. Cas., N. S., 763.

## Birmingham Ry., L. &amp; P. Co. v. McDonough

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by J. H. McDonough against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

*Tillman, Grubb, Bradley & Morrow*, for appellant.

*Bowman, Harsh & Beddow* and *J. H. Perdue*, for appellee.

DENSON, J. This is a suit by a passenger against a street railway company, as a common carrier, to recover damages for an alleged unlawful ejection of the plaintiff from a car by the conductor before the plaintiff had reached his destination. Only one assignment of error is insisted upon—that which challenges the correctness of the judgment of the court in sustaining a demurrer to plea 4.

By this plea the defense attempted to be made is, that at the time the wrongs and injuries complained of occurred the defendant was running or operating two cars, the front one a motor car, and the rear one a "trailer," which was attached to the motor; that defendant had a separate conductor in charge of each of said cars; that plaintiff first took passage on the motor car, and, while thereon, paid his fare to the conductor of that car; that thereafter plaintiff got off the motor car, and boarded and took passage on the trailer car; that the conductor on the trailer demanded fare of the plaintiff, and that plaintiff refused and failed to pay the conductor a fare entitling him to be carried as a passenger, whereupon the conductor, on account of plaintiff's refusal to pay the fare, ejected him, using no more force than was necessary. In the plea it is further averred that at the time the defendant had in force a rule which required the conductor in charge of the motor car to collect a fare from each passenger on that car, and the conductor of the trailer to collect a fare from each passenger on that car, and that said rule or regulation did not permit a passenger who had already paid fare on one of the cars to ride on the other without also paying his fare on that car. The plea avers, further, that the rule is a reasonable one, and that plaintiff was advised of its existence before he was ejected; that plaintiff, without the payment of an additional fare, could have resumed his journey by again getting on board the motor car, but that he refused to do this. It is settled law in this jurisdiction, as it is elsewhere, that a common carrier of passengers is clothed with a common-law right to make reasonable rules and regulations for the conduct of his or its business; further, that the reasonableness or not of a given rule is a question of law for the court, and not one of fact to be determined by the jury. 6 Cyc. 545 (C), and authorities in note 62 to the text; *Pullman Car Co. v. Krauss*, 145 Ala. 395, 40 South. 398, 4 L. R. A. (N. S.) 103, and authorities there cited.

The question, then, is the reasonableness *vel non* of the rule

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set up in the plea. It may be said to be common knowledge that street cars in the city of Birmingham are usually crowded—at least, that they are frequently so. Therefore the conductor is not presumed to know all of his passengers. He must necessarily be a stranger to a large portion of them, and not acquainted with their character for truthfulness. If passengers are allowed, and have the privilege of boarding one car and moving from that to another car—the two being coupled together, as the plea in this instance shows the cars were joined—it would be a very easy matter for a passenger to board one car and move to the other, and claim, when called upon for his fare, that he had paid on the other car, when in truth he had not; and the different conductor could have no means of knowing that the moving passenger had paid fare. We recognize the fact that this attributes to men an evil design; but at the same time observation and common knowledge will bear out the truthfulness of the statement that such characters are not too few. And the rule, in one phase, is for the protection of the carrier against such as would impose on it in this way; and as it would be impracticable to limit such a rule, in its terms, to such persons as would intentionally practice a fraud, it must cover all—good and bad—alike. Again, as is suggested in brief of appellant's counsel, it is common knowledge that conductors are required to "register up" each fare collected in their proper cars, and are required to collect from the register each passenger on each car. This check on the conductors would be rendered valueless if passengers were allowed to change from one car to another—each car having a separate conductor—without paying fare. We are of the opinion, and so hold, that the rule pleaded is a reasonable one, in the proper conduct of the business of the defendant, and necessary to protect it against imposition. *Nashville Street Ry. v. Griffin*, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451; *Hibbard v. N. Y. & Erie Ry. Co.*, 15 N. Y. 455; *Lasker v. Third Avenue R. R. Co.*, 27 Misc. Rep. 824, 57 N. Y. Supp. 395; *Faber v. Chicago, G. W. Ry. Co.*, 62 Minn. 433, 64 N. W. 918, 36 L. R. A. 789; 2 *Hutchinson on Carriers* (3d Ed.) § 1077.

The contention that the plea should show that reasonable accommodations were furnished plaintiff is not tenable. Construing the plea in connection with the complaint, this is manifestly matter for a replication, if it is available to the plaintiff. The insistence that the plea is bad, for that it fails to aver knowledge of the rule on the part of the plaintiff before he boarded the car from which he was ejected, is not sound. The plea avers that plaintiff was advised of the rule before he was ejected and that he might return to the motor car. In view of this averment, it was not necessary that he should have had knowledge of the rule before he boarded the car. *Morris v. Railroad Co.*, 116 N. Y. 552, 22 N. E. 1097; 2 *Hutchinson on Carriers* (3d Ed.) § 1077; *Hutchinson on Carriers* (2d Ed.) § 587. Notwithstanding the rule is a reasonable one, the defendant, as a

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matter of course, would be responsible for an unjust application of it, or for enforcing it with undue severity. *Nashville Street Ry. Co. v. Griffin, supra.*

It is argued that the defense set up in the plea could have been availed of by the defendant under the general issue, and therefore that the ruling of the court sustaining the demurrer was error without injury. It is too plain for argument that, where a rule or regulation of the carrier is relied on in defense, it is matter which must be brought forward by a special plea. *Southern Ry. Co. v. Lynn*, 128 Ala. 297, 29 South. 573. There is no bill of exceptions in the case; hence we cannot decide that defendant had the benefit of the matter pleaded on the trial under the plea of the general issue. *Finney v. Denny*, 122 Ala. 449, 25 South. 45.

The court erred in sustaining the demurrer to plea 4, and on account of the error the judgment is reversed, and the cause will be remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

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**RANOUS *et ux.* v. SEATTLE ELECTRIC CO.**

(Supreme Court of Washington, Nov. 13, 1907.)

[92 Pac. Rep. 382.]

**Carriers—Injury to Passenger—Street Cars—Acceleration of Speed.**

—A street car passenger, after having notified the conductor of her desire to stop at a certain street, arose from her seat and proceeded to the back platform to alight when the car stopped in response to the conductor's signal. As the car reached the center of the street, its speed was suddenly accelerated and the passenger was thrown and injured. The car did not stop at such street, and the acceleration of speed was not for the purpose of reaching the stopping place on the opposite side thereof. Held, that the carrier was not relieved from liability on the theory that it owed no duty to the passenger not to accelerate the speed before arriving at the stopping place in order to reach it.

**Same—Contributory Negligence.\***—A street car passenger is not negligent as a matter of law in leaving his seat when the car is approaching his destination and going to the platform to alight when the car stops.

**Same—Jolting or Jerking—Acceleration of Speed.†**—While a street

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\*For the authorities in this series on the question whether it is contributory negligence in a passenger to stand on the platform of a street car or steam railroad car, see foot-notes appended to *Louisville & N. R. Co. v. Mulder* (Ala.), 23 R. R. R. 66, 46 Am. & Eng. R. Cas., N. S., 66.

†For the authorities in this series on the subject of the duties and

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railway company is not liable to a passenger, who goes to the platform as the car is approaching her destination in order to alight when the car stops, for injuries resulting from ordinary jolting or jerking of the car or acceleration of speed in order to reach the usual stopping place, it is liable for injuries sustained by such passenger by a sudden acceleration of speed for the purpose of proceeding along the line without stopping in response to the conductor's signal to stop for the passenger to alight.

**Same—Knowledge of Operators.**—Where a street car conductor signaled for the car to stop as it approached a certain street, the operators of the car were bound to know that passengers might act on such signal and go to the platform to alight when the car stopped.

**Trial—Instructions—Requests Covered by Instructions.**—A requested instruction may be properly refused, where its substance is covered by another instruction given.

**Appeal—Invited Error.**—Where appellant attained all it sought in the trial court when it forced plaintiffs to object to the competency of a physician who attended the injured plaintiff for the first few days after her injury, appellant could not object on appeal to the court's ruling in sustaining an objection to the testimony of the physician, which it invited.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by L. P. Ranous and wife against the Seattle Electric Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

*Hughes, McMicken, Dovell & Ramsey*, for appellant.

*Geo. P. Rossman, Jackson Silbaugh, and Bard, Fenton & Gaffney*, for respondents.

RUDKIN, J. This was an action to recover damages for personal injuries. The testimony on the part of the plaintiff tended to show the following facts: The defendant owns and operates a street railway system in the city of Seattle. On the 30th day of April, 1906, the plaintiff boarded a Madison street car at Broadway for the purpose of being transported to Sixth avenue. At the time of paying her fare, or surrendering her transfer, she made known to the conductor in charge of the car her desire to alight from the car at Sixth avenue, and between Seventh and Eighth avenues she made a like request. As the car passed Seventh avenue the conductor sounded the bell, which is the customary signal for the car to stop at the next street—in this case, Sixth avenue. As the car approached Sixth avenue at a slow rate of speed, the plaintiff arose from her seat and proceeded to

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liabilities of carriers of passengers with respect to the jolting of cars or trains, see foot-notes appended to *Partelow v. Newton*, etc., Ry. Co. (Mass.), 24 R. R. R. 605, 47 Am. & Eng. R. Cas., N. S., 605; *Weeks v. Boston Elev. Ry. Co.* (Mass.), 24 R. R. R. 177, 47 Am. & Eng. R. Cas., N. S., 177; foot-notes appended to *Foley v. Boston & M. R. R.* (Mass.), 23 R. R. R. 32, 46 Am. & Eng. R. Cas., N. S., 32.

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the back platform of the car, with the intention of alighting from the car when the same should come to a stop. As the car reached about the center of Sixth avenue its speed was suddenly accelerated, and the lurch caused by such acceleration threw the plaintiff from her position on the back platform of the car into the street, causing injury to her person, for which a recovery is sought in this action. From a judgment in favor of the plaintiff, the defendant has appealed.

The principal question raised by the appeal is that the evidence was insufficient to justify the verdict. The argument in support of this contention is based largely upon the following statement contained in the appellant's brief: "The court will take notice of the fact that the usual stopping place of a street car is upon the far side of the street. The car, when its speed was accelerated, had not yet reached this point." While we know as a matter of fact that street cars usually stop at the far side of intersecting streets, we also know that there are exceptions to the rule. One exception is where the car is ascending or descending a steep grade. In such cases the cars stop on the level at the intersecting streets, which makes the stopping place for passengers the near, instead of the far, side of the street; and inasmuch as the testimony in this case shows that there is a steep decline on Madison street just after the car passes over the crossing on the lower side of Sixth avenue, it would seem that this case presents an exception to the general rule. But we do not at this time presume to take judicial notice of the usual stopping place of street cars, nor do we deem it material whether the stopping place of this particular car was at the far or near side of Sixth avenue; for it appears conclusively that the car did not in fact stop at Sixth avenue, and that the acceleration of the speed of the car on entering Sixth avenue was not for the purpose of reaching the stopping place on the opposite side of the street. The argument of the appellant is therefore based largely on a misapprehension of the facts disclosed by the record.

Counsel cite the case of *Etson v. Fort Wayne & B. I. Ry. Co.*, 110 Mich. 494, 68 N. W. 298, in support of their contention; also, *Philips v. St. Charles Street Ry. Co.*, 106 La. 592, 31 South. 135. In the former case the court said: "The car was not at a proper place to stop, but had nearly stopped. To propel it to the usual stopping place beyond the second walk (if such was the regulation), the application of power or the removal of the brake was necessary, possibly both. It is a natural law that inertia is not instantly overcome, and that a start or accelerated motion tends to throw down one riding upon a car. We cannot say that it was negligent for the plaintiff to step upon the platform at the time he did, because it is a daily occurrence and the usual practice for people to do so; but, on the other hand, if it were not negligence for him to be there when the car was in motion, it is difficult to see how it could be negligence on the part of the company to run its cars to the usual stopping place,



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although he was upon the platform. The car had a guard in the rear and a handle on the edge, and ordinarily a person is reasonably safe when upon the platform. At all events, it would be unjust to hold that by venturing upon the platform when the car was in motion the passenger can impose upon the company the obligation of instantly stopping or not accelerating the motion of the car." Two of the judges specially concur upon the ground "that the starting of the car, which it is claimed caused the plaintiff to fall from the platform, was not improper, and was not negligent under the circumstances. The car had not yet reached its stopping place at the time the plaintiff took his position on the platform, and the mere acceleration of the speed of the car by applying electricity, when it was discovered to be necessary in order to reach the usual stopping place before the car should come to a full stop, was not, in my judgment, negligence." In the latter: "From the whole case as presented we conclude that the plaintiff left his seat whilst the car was in motion, and took a position upon the lower step of the platform preparatory to alighting when the car should reach the crossing. It may be that the motoneer had slightly miscalculated, and that it became necessary just then to accelerate the motion of the car, in order that the rear platform might be exactly over the crossing when the car should stop, and that the plaintiff, resting possibly on one foot, was taken by surprise by the forward movement and lost his balance; but slight irregularities of movement are common incidents in the starting and stopping of street cars, and those who prepare to alight and do alight whilst the cars are in motion assume the risk resulting from such irregularities." These cases and others that might be cited established the following propositions: (1) That a street car passenger, who leaves his seat when the car is approaching his destination and goes to the platform for the purpose of alighting when the car comes to a stop, is not as a matter of law guilty of contributory negligence. *Consolidated Traction Co. v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 132; *Weir v. Seattle Electric Co.*, 41 Wash. 657, 84 Pac. 597. (2) That a street railway company is not liable to such a passenger for injuries resulting from the ordinary jolting or jerking of the car, or the acceleration of its speed for the purpose of reaching its usual stopping place.

This case, however, presents a different question. Here the respondent was not injured by the ordinary jerking or jolting of the car in reaching its usual stopping place, nor by the acceleration of its speed for that purpose. As said by this court in *Weir v. Seattle Electric Co.*, *supra*: "The negligence on the part of the respondent consisted in this: The servants in charge of the car led the appellant into a place of more or less danger and threw him off his guard. In other words, the appellant had a right to presume that the car would come to a stop at the north side of Virginia street, and to act upon that presumption. The jury might infer from this testimony that the failure to stop the car in obedience to the signal was the direct and proximate cause

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of the appellant's injury. It cannot be said, as a matter of law, that the appellant was guilty of contributory negligence. Indeed, the respondent does not so contend. It cannot be said that the appellant assumed the extra hazard arising from the failure of the respondent to stop the car, as it was in duty bound to do; nor, in our opinion, can it be said, as a matter of law, that the respondent was entirely free from negligence which contributed approximately to the injury. As above stated, we have thus far assumed that the appellant's testimony is true. Of course, if the signal to stop the car was not given until after the car passed beyond Virginia street, or if the appellant voluntarily stepped or jumped from the car, or was otherwise guilty of contributory negligence, he cannot recover." The rule there announced is not in conflict with cases cited by the appellant, and is supported by authority. *Scott v. Bergen County Traction Co.*, 63 N. J. Law, 407, 43 Atl. 1060; *Consolidated Traction Co. v. Thalheimer*, *supra*.

It is further said that the conductor and motorman did not know that the respondent was on the platform or in a place of danger. But if the bell was sounded to stop the car at Sixth avenue, as the respondent contends, the operators in charge of the car were bound to know that passengers might and constantly do act upon the warning thus given.

The next error assigned is the refusal of the court to give certain instruction requested by the appellant. The instructions requested were free from objection; but an examination of the charge as given shows that the court below gave the requested instruction in substance and fully safeguarded all the rights of the appellant.

The next error assigned is the ruling of the court in sustaining an objection to the testimony of the physician who attended the respondent for the first few days after her injury. An examination of the record convinces us that the appellant gained its point, and attained all it sought in the court below, when it forced the respondent to object to the competency of the witness. The ruling of the court in sustaining the objection was invited, rather than opposed, and will not be reviewed here.

Finding no error in the record, the judgment is affirmed.

MOUNT, FULLERTON, DUNBAR, and ROOT, JJ., concur. HADLEY, C. J., and CROW, J., did not sit.

**CHESAPEAKE & O. RY. CO. v. PARIS' ADM'R.**

(Supreme Court of Appeals of Virginia, Nov. 21, 1907.)

[59 S. E. Rep. 398.]

**Carriers—Injury to Person Assisting Passenger.\***—A person accompanying passengers to assist them in entering a train, though not a passenger, is not a trespasser, nor bare licensee, as he has at least a tacit invitation from the carrier by virtue of the relation between it and the passenger, and the carrier must exercise at least ordinary care to avoid injuring him by defective station facilities or approaches thereto.

**Same—Persons Assisting Passenger—Duty to Hold Train Until They Have Disembarked—Notice of Intent.\***—Though a person assisting a passenger in boarding a train has a right to enter the train in conformity with a practice acquiesced in by the carrier, he should inform those in charge of his purpose; and, where they have no actual or constructive notice that he intends to disembark, they are not bound to hold the train, nor to notify him before it starts.

**Same—Injury to Person Alighting from Train—Negligence.**—Where a brakeman in good faith makes an unsuccessful attempt to prevent one who had assisted a passenger to board a train from alighting after it had started, the railroad is not liable for the person's injury, although he might have alighted in safety had the brakeman not interfered; the brakeman's act being one in an emergency, which will not create a liability on the master's part, though the result shows it to have been a mistake.

Error to Circuit Court, Augusta County.

Action for the death of his intestate by the administrator of James R. Paris against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

*R. L. Parrish*, for plaintiff in error.

*Charles Curry* and *Pcyton Cochran*, for defendant in error.

WHITTLE, J. The plaintiff in the circuit court (defendant in error here) brought this action to recover damages for the death of his intestate, James R. Paris, alleged to have been caused by the negligence of the plaintiff in error, the Chesapeake & Ohio Railway Company.

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\*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to persons assisting or accompanying their passengers, see foot-notes appended to *Seaboard Air Line Ry. Co. v. Bradley* (Ga.), 24 R. R. R. 183, 47 Am. & Eng. R. Cas., N. S., 183; foot-notes appended to *Louisville & N. R. Co. v. Wilson* (Ky.), 22 R. R. R. 830, 45 Am. & Eng. R. Cas., N. S., 830; *Cincinnati, etc., Ry. Co. v. Giboney* (Ky.), 22 R. R. R. 803, 45 Am. & Eng. R. Cas., N. S., 803.

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Treating the case as upon a demurrer to the evidence, the essential facts are as follows: The intestate, who at the time of the accident was 76 or 77 years of age, accompanied his daughter, an intending passenger, from their home in Staunton, Va., to the company's station in that city. On the arrival of the train the conductor and brakeman, as usual, stationed themselves at the front end of the rear coach to assist passengers in leaving and entering the cars. The intestate escorted his daughter into the rear car, carrying her hand baggage, and secured a seat for her about midway the coach. The train crew did not know, and there was nothing to lead them to suspect, that he was not a passenger, or that he intended to get off. That he had ample time, in the exercise of ordinary care, to have left the train in safety, is shown by the circumstances that it remained at the station five minutes, two minutes longer than the regulation stop, and that the conductor, after giving the leaving signal, boarded the train and went into the forward car to take up tickets before the intestate appeared on the front platform of the rear coach.

The account given by some of the plaintiff's witnesses of occurrences at the moment of the accident is that while the intestate was descending the steps the train was put in motion, and thereupon he was seized from behind by a brakeman on the platform of the car; that he turned his head and looked at the brakeman, and then either broke his hold or was turned loose and fell to the station platform below, and rolled thence under the moving train, between the rail and platform, and was struck by the step on the rear end of the coach and fatally injured. Though several witnesses expressed the opinion that the intestate could have alighted in safety, but for the interference of the brakeman, there is no suggestion that the latter was not acting in good faith in his effort to rescue the intestate from the peril of jumping off the moving train.

The rule of law regulating the duty of a railway company to persons coming to stations to assist passengers is correctly stated in 2 Hutchinson on Carriers (3d Ed.) § 991: "A person who comes to a railroad station to assist passengers in entering or leaving the train, though not a passenger, is not a trespasser, as he comes with at least the tacit invitation of the carrier. While so engaged he does not stand in the relation to the carrier of a bare licensee, but is deemed to have been invited to be there by virtue of the relation existing between the carrier and the intending or arriving passenger. The carrier, therefore, owes to him the duty of exercising at least ordinary care to see that he is not injured by reason of defective station facilities or approaches thereto.

"So one who goes on a train to render necessary assistance to a passenger, in conformity with a practice approved or acquiesced in by the carrier, has a right to render the needed assistance and leave the train; and the carrier, in permitting him to enter with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable

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time therefor. \* \* \* But the duty of the carrier in this respect is dependent upon the knowledge of such person's purpose by those in charge of the train; for without such knowledge they may reasonably conclude that he entered to become a passenger, and cause the train to move after giving him a reasonable time to get aboard. He should, accordingly, notify some one in the management of the train of his presence, business, or purpose, so as to create some relation to the carrier, and thus make it its duty to care for him; and when the carrier's servants have no knowledge, or there are no circumstances tending to put them on notice, that a person who has boarded a train to assist another intends to alight before the train starts, they are not bound to hold the train until he has had time to disembark, nor to notify him before the train has started." See, also, *Shearman & Redfield on Neg.* (5th Ed.) § 492a; *Little Rock, etc., Ry. Co. v. Lawton*, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48, and notes.

Applying these just rules to the facts of this case, it is clear that the plaintiff has wholly failed to fix actionable negligence on the defendant company. It was the brakeman's duty to have endeavored to protect the intestate from danger incident to his stepping off a moving train, and if, perchance, disaster attended his efforts in that regard, the master cannot be held answerable in damages for the fortuitous result.

"One who, by his own negligence, has placed another in an emergency cannot require of that other the wisest possible action in order to save him from the consequences of his own fault." *Wise Ter. Co. v. McCormick*, 104 Va. 400, 51 S. E. 731.

We are of opinion that the judgment complained of should be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed.

BRICK *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, Oct. 16, 1907.)

[58 S. E. Rep. 1073.]

**Judgment—Res Judicata.**—A judgment of the Supreme Court, affirming a judgment for defendant rendered on appeal from a justice's judgment on the ground that the justice had no jurisdiction of the subject-matter, is not a bar to a subsequent suit on the same cause of action.

**Carriers—Transportation of Baggage—Liability.\***—A carrier is an insurer of the personal baggage of a passenger.

**Same—Personal Baggage—What Constitutes.†**—The personal baggage of a passenger includes jewelry carried for his personal use, but not that carried for sale or for the use of another.

**Same—Carriage of Baggage.**—The carriage of the personal baggage of a passenger is incident to the ticket purchased, and is personal to the user of the ticket, except where several members of a family are traveling together, in which case articles belonging to them may be checked as the baggage of one.

**Same—Loss of Baggage—Right of Action.**—Where the user of a ticket was not the owner of the goods checked as baggage, and he and the owner were not traveling together, the owner was the proper party to sue for loss of the baggage, and not the user of the ticket.

**Same—Liability of Carrier.\***—Where goods not the personal baggage of a passenger are checked as his baggage without the fact being brought to the knowledge of the carrier, the carrier is liable only as a gratuitous bailee, and to recover for a loss gross negligence or willful injury must be clearly shown.

**Appeal—Review—Harmless Error.**—In an action against a carrier by the owner of lost baggage, which had been checked on a ticket bought for another person, a charge that plaintiff could not recover, while error, because the carrier, being a gratuitous bailee, was liable for gross negligence, was harmless; there being no evidence of gross negligence.

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\*See note by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., p. i; foot-note appended to *Wood v. Maine Cent. R. Co.* (Me.), 9 R. R. R. 721, 32 Am. & Eng. R. Cas., N. S., 721, where all the preceding authorities on the subject in this series are collected; foot-notes appended to *Sperry v. Consolidated Ry. Co.* (Conn.), 23 R. R. R. 499, 46 Am. & Eng. R. Cas., N. S., 499; extensive note appended to *Chesapeake & O. Ry. Co. v. Beasley Conch & Co.* (Va.), 23 R. R. R. 168, 46 Am. & Eng. R. Cas., N. S., 168.

†For the authorities in this series on the question what does, and does not, constitute a passenger's baggage, see foot-notes appended to *McElroy v. Iowa Cent. Ry. Co.* (Iowa), 23 R. R. R. 466, 46 Am. & Eng. R. Cas., N. S., 466; foot-notes appended to *New Orleans, etc., R. Co. v. Shackelford* (Miss.), 24 R. R. R. 15, 47 Am. & Eng. R. Cas., N. S., 15.



**Brick v. Atlantic Coast Line R. Co**

Appeal from Superior Court, Robeson County; Webb, Judge.

Action by A. B. Brick against the Atlantic Coast Line Railroad Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

See 55 S. E. 194.

The plaintiff sued to recover the value of the contents of a trunk by him delivered to the defendant. It was in evidence that the plaintiff, who was a merchant, packed the trunk with certain wearing apparel, and also placed therein certain jewelry. The plaintiff purchased a ticket and checked the baggage and delivered the ticket to his brother, who was a clerk in the employ of plaintiff, and who was going to Chadbourne for the purpose of clerking in the plaintiff's store. Plaintiff's brother used the ticket. The jewelry was to be sold in plaintiff's store at Chadbourne. Demand was made upon the defendant for the baggage, and it has failed to produce same or account for its non-production. It is admitted that the defendant had no knowledge of the contents of the trunk. The value of the wearing apparel was \$46.75, and the jewelry \$207.83. On the trial of a former action before the justice, plaintiff remitted all of his claim in excess of \$200. The justice rendered judgment for plaintiff, and defendant appealed. Upon the trial in the superior court, his honor charged the jury that in no event could the plaintiff recover the value of the jewelry. Thereupon a verdict was rendered for \$46.75, the value of the wearing apparel, and plaintiff appealed to the Supreme Court. This court affirmed the judgment below, declaring that the justice had no jurisdiction of the cause of action for the value of the jewelry, inasmuch as this demand was in tort and in excess of \$50. 142 N. C. 359, 55 S. E. 194. Thereupon the plaintiff instituted this new action in the superior court, founded in tort, asking for the recovery of the value of the jewelry. A jury trial was waived, and thereupon the court found the facts to be as testified to by the plaintiff on the former trial. His honor further found the value of the jewelry to be \$207.83. Upon the uncontroverted facts his honor, being of opinion that the plaintiff could not recover, nonsuited the plaintiff, and he appealed.

*McIntyre & Lawrence*, for appellant.

*McLean, McLean & McCormick*, for appellee.

CLARK, C. J. The plaintiff is not estopped by the former judgment (142 N. C. 359, 55 S. E. 194), because it was held therein that the court of justice of peace (in which that action began) had no jurisdiction as to the tort for nondelivery of the jewelry. The subject-matter of this action was not passed upon, and could not have been, in that action. *Harrington v. Hatton*, 130 N. C. 89, 40 S. E. 848; *Smith v. Garris*, 131 N. C. 34, 42 S. E. 445.

The common carrier is "insurer of the personal baggage of the passenger, and this includes jewelry, carried for the personal use of the passenger, to a reasonable extent, but not when it is car-

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ried for the purpose of sale or for the use of some one else." 3 A. & E. Encyc. (2d Ed.) 534; *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587. This last case, citing many others (page 642, of 148 U. S. [13 Sup. Ct. 711, 37 L. Ed. 587]), holds that in such case the carrier is chargeable merely with the duty of a gratuitous bailee and liable not in contract, but in tort, and hence only for gross negligence or willfulness. "Articles carried for sale are not baggage, whatever the articles may be." 2 Fetter, *Carriers of Passengers*, § 587, p. 1440, and cases cited. Nor is the carrier insurer of merchandise delivered to the carrier by a passenger as personal baggage, without notice of the contents. *Id.* § 602, p. 1459; 6 Cyc. 668; 3 A. & E. Encyc. (2d Ed.) 539; 3 *Thomp. Neg.* § 3417, and cases cited.

Even when it is personal baggage, the carriage is incident to the ticket purchased, and is personal to the user of the ticket. There are exceptions, as where several members of a family or husband and wife are traveling together, and articles belonging to both are in a trunk. 3 *Thomp. Neg.* 3424. The user of the ticket in this case was not the owner of the trunk and contents, nor were he and the owner traveling together. He could not recover for the baggage of another. 3 A. & E. Encyc. 533; 2 Fetter, *Carriers*, § 600, p. 1455. This action is properly brought by the party in interest, the owner of the property.

Where the baggage is not personal baggage, or, if such, when it is not the personal baggage of the passenger, it is a fraud on the carrier, unless that fact is made known, and the baggage is notwithstanding accepted for carriage. Unless this is done, there is no contract, and the liability of the carrier is that of a gratuitous bailee, responsible only for gross negligence or willful injury. 1 Fetter, *Carrier of Passengers*, § 607, p. 1470; 3 A. & E. Encyc. 533. In such cases, negligence must be clearly shown and cannot be presumed by the mere fact of loss or injury, as in the ordinary case of loss of, or injury to, the personal baggage of a passenger. 3 A. & E. Encyc. (2d Ed.) 542; *Young v. Railroad*, 116 N. C. 936, 21 S. E. 177. It would be otherwise if the carrier received the trunk with knowledge of its contents. *Trouser Co. v. Railroad*, 139 N. C. 282, 51 S. E. 973, where the subject is fully discussed by Walker, J.

The plaintiff here can maintain the action, though he was not the passenger using the ticket, but only by showing gross negligence or willful misconduct.

The court erred in holding that in no event could the plaintiff recover; but, as there was no evidence of gross negligence, this was harmless error, and the judgment is affirmed.

**CINCINNATI, N. O. & T. P. R. Co. v. COMMONWEALTH.**

(Court of Appeals of Kentucky, Oct. 3, 1907.)

[104 S. W. Rep. 394.]

**Intoxicating Liquors—Offenses—Transportation.**—Where a carrier received in another state intoxicating liquor consigned to a person in the state, and delivered the same to him in a county where the local option law prevailed, its act was within Acts 1906, p. 320, c. 63, declaring it unlawful for a common carrier to bring into or deliver in any county, etc., where the sale of intoxicating liquor is prohibited, any intoxicating liquor.

**Commerce—Interstate Commerce—Regulation by States.\***—Under the provision of the Constitution of the United States that Congress shall have power to regulate commerce among the several states, Acts 1906, p. 320, c. 63, which undertake to impede, burden, or regulate the bringing of intoxicating liquors by carriers into the state, is unconstitutional and void.

**Same—Intoxicating Liquor.†**—That liquor was taken from a point in Kentucky to a point outside the state, and from there shipped back to a consignee in Kentucky, for the purpose of evading the local option law of Kentucky, did not as against the carrier render such shipment subject to state regulation, as not being interstate commerce.

**Same.**—Whether a carrier knew that the commodity presented for transportation from one state to another was malt liquor, or that the point to which shipped was in a local option district, is immaterial as affecting the liability of such shipment to state regulation.

Appeal from Circuit Court, Boyle County.

“To be officially reported.”

The Cincinnati, New Orleans & Texas Pacific Railroad Company was convicted of a violation of Acts 1906, p. 320, regulat-

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\*For the authorities in this series on the subject of state regulation of interstate commerce, see foot-notes appended to *Skipper v. Seaboard Air Line Ry.* (S. Car.), 24 R. R. R. 306, 47 Am. & Eng. R. Cas., N. S., 306; foot-notes appended to *McNeill v. Southern Ry. Co.* (U. S.), 24 R. R. R. 285, 47 Am. & Eng. R. Cas., N. S., 285; foot-notes appended to *State v. Thompson* (Ore.), 24 R. R. R. 150, 47 Am. & Eng. R. Cas., N. S., 150; *Houston, etc., R. Co. v. Mayes* (U. S.), 24 R. R. R. 50, 47 Am. & Eng. R. Cas., N. S., 50; foot-notes appended to *Harrill Bros. v. Southern Ry.* (N. Car.), 23 R. R. R. 427, 46 Am. & Eng. R. Cas., N. S., 427.

†For the authorities in this series on the question whether a carrier was engaged in interstate commerce on a particular occasion, see foot-notes appended to *Shore & Bros. v. Baltimore & O. R. Co.* (S. Car.), 24 R. R. R. 578, 47 Am. & Eng. R. Cas., N. S., 578; foot-notes appended to *Southern Flour & Grain Co. v. Northern Pac. Ry. Co.* (Ga.), 23 R. R. R. 529, 46 Am. & Eng. R. Cas., N. S., 529; *State v. Omaha Elevator Co.* (Neb.), 23 R. R. R. 510, 46 Am. & Eng. R. Cas., N. S., 510.

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ing the carrying, moving, etc., of intoxicating liquors in local option districts, and it appeals. Reversed.

*Charles H. Rodes and John Galvin*, for appellant.

*N. B. Hays, Atty. Gen.*, for the Commonwealth.

BARKER, J. The appellant, Cincinnati, New Orleans & Texas Pacific Railroad Company, was indicted by the grand jury of Boyle county, charged with the offense of transporting liquor into Boyle county where the local option law prevails, in contravention of the provisions of an act of the General Assembly of the commonwealth of Kentucky approved March 21, 1906, entitled "An act to regulate the carrying, moving, delivering, transferring, or distribution of intoxicating liquors in local option districts." Acts 1906, p. 320, c. 63. A plea of not guilty was entered, and a trial resulted in the conviction of the defendant and the infliction of a fine of \$60 of which it is now complaining.

The evidence showed that appellant is a railroad corporation whose northern terminus is in Ohio, and whose southern is in the state of Tennessee, and that it is engaged in the business of a common carrier between its termini and all immediate points along its line; that it received in the city of Cincinnati, in the regular course of business, a box containing five gallons of beer in bottles, which was consigned to Henry Silliman, in Danville, Ky.; that, as a common carrier, it transported this box from Cincinnati to Danville, and there delivered it to the consignee. There can be no doubt that this act of the defendant (appellant) is directly within the prohibition of the statute under which the indictment was framed, and that, if it is within the province of a state by its laws to regulate or control interstate commerce, then the conviction and punishment of the defendant was just and proper. It has been a well-settled principle ever since the case of *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23, that under the Constitution of the United States the right "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," is exclusively within the province of Congress, and that any state statute which undertakes to impede, burden, or regulate such commerce is unconstitutional and void. *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; *License Cases*, 5 How. (U. S.) 504, 12 L. Ed. 256; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417; *Adams Express Co. v. Iowa*, 196 U. S. 147, 25 Sup. Ct. 185, 49 L. Ed. 424; *Vance v. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; *Bowman v. C. & N. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; *Lord v. Goodall, N. P. S. S. Co.*, 102 U. S. 541, 26 L. Ed. 224; *Pacific Coast S. S. Co. v. R. R. Commissioners (C. C.)* 18 Fed. 10; *Hanley v. Kansas City Ry. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333.

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We do not think the fact that the liquor in question was brought from Kentucky to Cincinnati by the consignor, and there shipped to the consignee in Kentucky, in any wise changed the legal complexion of the transaction from one of legitimate interstate commerce, or that it had any tendency to bring it within the purview of a state statute. In the case of *Heyman v. Southern Ry. Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, the Supreme Court of the United States held that the common carrier was compelled to carry liquor from one state into another when it was tendered for transportation in the regular course of business and was bound to deliver it to the consignee, and that no state law could be applied until the liquor had been actually delivered into the possession of the consignee. In the case of *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, it was held that, where liquor was shipped from Illinois into Iowa, the statutes of the latter state could in no wise control the transaction in transit or before it was delivered to the consignee. In the case of *Lord v. Goodall, N. P. S. S. Co.*, 102 U. S. 541, 26 L. Ed. 224, it was held that where goods were shipped from one point in a state to another point in the same state, by means of coastwise navigation on the high seas, the shipment was one of interstate commerce, and beyond regulation by the state. In *Pacific Coast S. S. Co. v. R. R. Commissioners (C. C.)* 18 Fed. 10, Mr. Justice Field said: "To bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state." And in *Hanley v. Kansas City Ry. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, the Supreme Court, after quoting with approval the language of Mr. Justice Field above stated, held that a shipment from one point in Arkansas to another point in that state by a continuous journey by rail, but which in the course of transportation passed out of the state of Arkansas into the Indian Territory, and then back into Arkansas, was interstate commerce, and could not be regulated or controlled by legislation of the state of Arkansas.

The question of the shipment on the part of the consignor being a trick or device to evade the local option laws of Kentucky has no place in the transaction, so far as the common carrier is concerned. It cannot be a trick or device inimical to law to do that which the carrier not only had a right to do, but which it was under law bound to do. As a common carrier of interstate commerce, it could not refuse the shipment. So far as it was concerned, the state had no power to regulate its business, and it could not be said to violate by trick or device laws which could have no application to its business or control thereof. It was therefore immaterial whether the carrier knew, or did not know, that the commodity presented for transportation was malt liquor, or that Boyle county was a local option district. The Supreme Court of the United States, since the case of *Brown v. Maryland*, 12 Wheat. (U. S.) 435, 6 L. Ed. 678, has held that spirituous, vinous, and malt liquors are legitimate subjects of in-

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terstate commerce, and beyond the control of state laws when constituting a part of such commerce.

The evidence in this case establishing beyond question that the shipment for which the appellant was indicted was interstate commerce, it was entitled at the close of the testimony for the state to a peremptory instruction to find it not guilty, and the trial court erred in overruling the motion for such an instruction.

The foregoing reasoning, however, has no application to the consignor brewing company, and we express no opinion as to the validity of its action in the premises.

The judgment is reversed for proceedings consistent with this opinion.

**PAYNE v. ILLINOIS CENT. R. CO.**

(Circuit Court of Appeals, Sixth Circuit, June 15, 1907.)

[155 Fed. Rep. 73.]

**Carriers—Passengers—Termination of Relation.\***—A passenger on a railroad train alighted in the night at the town where he resided. The station, the town, and his home were all on the west side of the track, and the doors of the cars, which were vestibuled, were opened on that side. After his train had departed, he was killed by another

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\*For the authorities in this series on the question whether a person is a passenger after he alights from the train or street car at his destination, see *Chicago Union Traction Co. v. Rosenthal* (Ill.), 21 R. R. R. 747, 44 Am. & Eng. R. Cas., N. S., 747 (person when alighting from street car and attempting to lift his child from it, standing with one foot on ground and one on foot-board); *St. Louis S. W. Ry. Co. v. Highnote* (Tex.), 16 R. R. R. 41, 39 Am. & Eng. R. Cas., N. S., 41 (alighted passenger entitled to reasonable time to leave station premises); *Dallas Rapid Transit Co. v. Payne* (Tex.), 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25 (alighting from moving street car without paying fare); *Quantz v. Southern Ry. Co.* (N. Car.), 15 R. R. R. 259, 38 Am. & Eng. R. Cas., N. S., 259 (passenger, after he alighted, falling down stairway in depot building, to whom carrier did not owe the duty of keeping depot doors shut, but only that of keeping the way free from danger); *Pittsburgh, etc., Ry. Co. v. Gray* (Ind.), 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120 (person on platform after alighting from train); *Conroy v. Boston Elevated Ry. Co.* (Mass.), 19 R. R. R. 384, 42 Am. & Eng. R. Cas., N. S., 384 (termination of relation between street-car passenger and carrier); *Girton v. Lehigh Valley R. Co.* (Pa.), 21 Am. & Eng. R. Cas., N. S., 157; *Brunswick & W. R. Co. v. Moore* (Ga.), 12 Am. & Eng. R. Cas., N. S., 84; *Chicago & A. R. Co. v. Winters* (Ill.), 12 Am. & Eng. R. Cas., N. S., 93; *Louisville & N. S. Co. v. Keller* (Ky.), 12 Am. & Eng. R. Cas., N. S., 89; note, 20 Am. & Eng. R. Cas., N. S., 131 (when relation terminates); note, 12 Am. & Eng. R. Cas., N. S., 88 (reasonable time to depart from carrier's premises); note, 20 Am. & Eng. R. Cas., N. S., 127 (persons in waiting room); *Chicago Terminal Transfer R. Co. v. Schmelling* (Ill.), 5 R. R. R. 298, 28 Am. & Eng. R. Cas., N. S., 298 (person standing on narrow space between tracks after alighting).



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train on a track to the eastward. Held, that he had ceased to be a passenger prior to his death, and the company at that time owed no duty to him as such.

**Death—Action for Wrongful Death—Questions for Jury.**—To justify the submission to the jury of a case brought to recover for the death of a person, alleged to have been caused by the negligence of defendant, there must be substantive proof not only of such negligence, but that it brought about the injury.

**Same—Death of Person on Railroad Track—Evidence of Negligence.**—In an action for wrongful death, it was shown that deceased was a passenger on a vestibule train on defendant's railroad, and alighted therefrom at night at the town where he resided. The station, town, and the home of deceased were all on the west side of the track, and the doors of the train were opened on that side. On a side track to the eastward of the main track, a freight train was standing waiting for the passenger train to pass. After the latter had gone, the freight started, but a coupling broke, and the cars were separated some 30 feet before the front portion stopped, standing across a private crossing. The conductor and a flagman went back to the caboose with a lantern for a knuckle, walking along the west side of the cars. After the front part of the train had been backed up and coupled, the conductor passed forward to the engine on the same side of the cars, when he discovered the body of the deceased lying near the private crossing, on its back, with the feet to the west, and the head on the west rail, where it had been crushed by the wheels evidently when the cars were backed. There were no other injuries, and the clothing was not disarranged. The side track at the place of the injury was being moved, and the earth had been removed from between the ties, and it was unlighted. Held, that such facts would not warrant a finding that the death was due to such condition of the track, where all the evidence tended to show that the case was one of suicide, and, in any event, that deceased was a trespasser and guilty of such contributory negligence as to preclude a recovery.

**Railroads—Operation—Statutory Regulations—Tennessee Statute.**—Shannon's Code Tenn. § 1574, subsec. 4, which requires every railroad company to keep some person on the locomotive always on the lookout ahead and to sound the whistle, apply the brakes, and employ every means to stop the train when any person, animal, or other obstruction appears upon the road, does not apply to a train which became uncoupled on a side track in depot grounds and was backing up to recouple.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

*K. D. McKellar*, for plaintiff in error.

*Charles N. Burch*, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This action was brought by the plaintiff to recover for the wrongful death of her husband,

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George Payne, who was run over and killed on the night of February 2, 1904, by a portion of a freight train of the Illinois Central Railroad Company, in the depot grounds at Dyersburg, Tenn. Payne lived in Dyersburg. Between 10 and 11 o'clock that night he arrived there from Paducah, Ky., on a vestibuled passenger train. A short time afterwards he was found dead on the side or passing track, then in use by a freight train bound north, which had been waiting for the south-bound passenger train, and was expecting to leave as soon as it arrived. Payne was killed by one of the portions of this freight train while being coupled together. The question raised below, and the only one in the case, is whether the proofs presented a case for recovery. The defendant submitted that no negligence on its part causing the accident was shown. This the court held and directed a verdict for the railroad company. Was the court correct in so holding?

The passenger train which Payne took reached Dyersburg between 10 and 11 o'clock that night. He was seen on the train, but no one observed him leave it. The train was vestibuled, and was going south. After the usual custom, the vestibules were opened on the west side. The station was located on the west side of the main track, and so was the town and the home of the deceased. Payne was well acquainted with the town, had lived there for 18 years, was accustomed to railroad travel, and there was no occasion, so far as any one knew, for him to leave the train, except in the usual way, on the west side. When Payne arrived at the depot in Dyersburg that night, there was in the depot grounds, in addition to the main track, a side or passing track which lay to the east of the main track. Later the main track and the passing track were made into a double track. At the time of the accident there was a cut-off or switch connecting these two tracks, which was in process of removal; the gravel and dirt being taken out from between the ties.

The depot at Dyersburg was located between two crossings; the one on the south being a public crossing, and the one on the north a private crossing, used by persons having freight business with the railroad company. At the time the south-bound passenger train arrived at Dyersburg, a north-bound freight train was standing on the side or passing track, waiting for the passenger train to get out of the way. This freight train pulled into Dyersburg from the south at about 8 o'clock. It consisted of 28 or 30 freight cars. After its arrival, it was cut in two, leaving the rear cars south of the public crossing and the front cars (about 20 of them) north of it. This was done to permit the use of the public crossing. The private crossing to the north remained blocked by the cars which composed the front end of the freight train. Before the passenger train arrived, however, the front end of the freight had been backed and coupled to the rear cars, so the freight train was ready to pull out when the passenger train should leave. The freight train did not, however, start north until the passenger train left. When it started north,

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it had gone only about 30 feet, when, by the breaking of a knuckle, it became uncoupled and parted about five or six car lengths south of the private crossing. The train being equipped with air brakes, which operated automatically, the rear cars were separated from the front not more than 30 feet. When the conductor discovered that the train had parted, he went back to the caboose for a knuckle. To get there he went along the west side of the passing track. He had his lantern and went by the point where Payne's body was subsequently found. So did the flagman, but neither saw a body. After securing a new knuckle in the caboose, the signal was given to the engineer to back. The cars composing the front end of the train were run slowly over the intervening space and the coupling effected. The conductor then proceeded north on foot to get to the engine and discovered Payne's body on the track, about two feet south of the private crossing. He had, in all probability, been run over when the front end of the train was backing in order to couple to the cars in the rear. The body was lying on the back, the head on the west rail of the east or passing track, and the body perpendicular to that track, stretching out toward the main track; the right hand was alongside the head, and was nearly severed, while the left hand was straight down alongside the body. The clothes were clean, there was no indication that the body had been rolled or dragged. The wheel had apparently passed over the mouth, and the lower part of the face was mashed to a pulp. There were no other injuries.

The negligence charged against the railroad company was: First, in negligently killing Payne when he was still a passenger, and when the company was under obligation to exercise a very high degree of care towards him; second, in negligently leaving a portion of the passing track, where the cut-off switch was located, unguarded and unlighted, when in a torn-up condition; and, third, in not taking the statutory precautions required by the law of Tennessee, when Payne was encountered as an obstacle on the track.

With respect to the first claim, it may be observed that the depot and the town were both on the west side of the track. The vestibules of the coaches were opened for passengers to alight on that side. The presumption is that Payne alighted on that side, and there is no evidence to the contrary. After thus alighting from the train, with a straight and unimpeded way into the town, and to his home, Payne ceased to be a passenger. No reason is given in the testimony, no explanation is offered, which would justify him either in alighting on the east side of the vestibuled train, or in crossing the west track and attempting to cross the passing track. When he was run over and killed on the passing track, his own train had pulled out and gone south, and his relation to it as passenger had long ceased.

The claim that the company was negligent in leaving the torn-up, cut-off track unlighted and unguarded is based, of course, upon the supposition that Payne stumbled and fell be-

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cause of that condition, and was caught and run over by the freight train. This is pure conjecture. There is no proof whatever tending to support it; and there must be substantive proof not only that the defendant was negligent, but that the negligence brought about the injury, in order to justify the submission of the case to the jury. *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; *Carnegie Steel Co. v. Byers* (C. C. A.) 149 Fed. 667; *Moit v. Ill. Central R. R. Co.*, 153 Fed. 354.

The theory that Payne stumbled in the dark because of the torn-up track, and fell under the freight train, is not only without any support in the evidence, but refuted by it. The position of the body, the nature of the injuries, and the condition of his clothes, all indicate conclusively that he was not run down or dragged; but that he deliberately lay down with his head on the track. Payne had been a saloonist for many years and had lost his job by Dyersburg "going dry" the preceding summer. He had been suffering from the grip and was out of employment. He had been on an unsuccessful hunt for a job, and while away from home had talked, and acted in a peculiar manner. He was identified by his cuffs, which were in his overcoat pocket. He has taken the precaution to write his name in pencil on them. The court cannot permit a jury to guess that in some way or other the death of a person was brought about by negligence, when the evidence all points to suicide. Payne never stumbled over the torn-up, cut-off track. He never started to cross it. He had no reason to and no design. The crossing there was private. It was blocked. His purpose ended with the nearest rail and the crushing wheels soon to pass over it.

The final point made by the plaintiff was that the railroad company omitted the statutory precautions it should have taken. But no statutory precautions were demanded under the circumstances. Subsection 4 of section 1574, Shannon's Code, provides as follows:

"Every railroad company shall keep the engineer, fireman or some other person upon the locomotive always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an accident."

Our understanding is that the statute does not apply, and the precautions are not required, where the train is being made up in the depot grounds, as this one was. The movement which injured Payne was the slow backing movement preliminary to the final coupling up of the separated portions of the train. *Cox v. L. & N. R. R. Co.*, 1 Shannon, Tenn. Cases, 475; *Rogers v. R. R. Co.*, 136 Fed. 573, 69 C. C. A. 321; *R. R. Co. v. Pugh*, 95 Tenn. 419, 32 S. W. 311.

But if Payne did not deliberately lie down upon the track, he was guilty of such negligence in attempting to cross the passing track when blocked and in use by a freight train then being

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made up, as to plainly preclude a recovery. Under the circumstances, he was an intruder and trespasser. Besides, Payne was in a part of the station grounds where a passenger had no right to be, and the railroad company owed him no duty of precaution, unless his presence in that place was known to its employees, and this is not claimed.

Judgment affirmed.

**BLOMSNESS v. PUGET SOUND ELECTRIC RY.**

(Supreme Court of Washington, Nov. 21, 1907.)

[92 Pac. Rep. 414.]

**Master and Servant—Tort of Servant—Liability of Master.\***—The liability of the master for intentional acts of servants only arises where the acts complained of are within the apparent scope of the master's business.

**Carriers—Contract—Liability—Tort of Servant.†**—The contract of a carrier is to safely carry its passengers and to compensate them for all tortious injuries inflicted by the servant within the scope of the employment.

**Same—Who Are Passengers—Termination of Relation—Tort of Servant.‡**—Where plaintiff paid his fare from T. to S., which also entitled him to a transfer to B., which the conductor promised him at a certain point, but at the point named plaintiff did not see the conductor, and at S., where it was necessary for him to change cars, he asked for the transfer, and the conductor requested him to get out of the way of the other passengers, and he got off the car, whereupon a dispute arose over the transfer, and plaintiff was assaulted by the conductor, held, that the relation of passenger and carrier had not terminated.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Matt Blomsness against the Puget Sound Electric Railway. From a judgment of nonsuit, plaintiff appeals. Reversed.

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\*See foot-notes appended to *Southern Ry. Co. v. Power Fuel Co.* (C. C. A.), 24 R. R. R. 800, 47 Am. & Eng. R. Cas., N. S., 800; *Louisville & N. R. Co. v. Gillen* (Ind.), 24 R. R. R. 511, 47 Am. & Eng. R. Cas., N. S., 511; foot-note appended to *Roberts v. Southern Ry. Co.* (N. Car.), 22 R. R. R. 106, 45 Am. & Eng. R. Cas., N. S., 106.

†For the authorities in this series on the subject of the liability of the carrier for assaults on its passengers by its employees, see *Ford v. Minneapolis St. Ry. Co.* (Minn.), 21 R. R. R. 182, 44 Am. & Eng. R. Cas., N. S., 182; foot-notes appended to *Garvick v. Burlington, etc., Ry. Co.* (Iowa), 20 R. R. R. 496, 43 Am. & Eng. R. Cas., N. S., 496; foot-notes appended to *Foster v. Grand Rapids Ry. Co.* (Mich.), 17 R. R. R. 512, 40 Am. & Eng. R. Cas., N. S., 512.

‡See preceding case and foot-notes.

*Blomsness v. Puget Sound Elec. Ry**Geo. P. Rossman*, for appellant.*James B. Howe and Hugh A. Tait*, for respondent.

DUNBAR, J. This is an action for personal injuries alleged to have been sustained by the appellant by being struck in the face and on the head with a lantern in the hand of a conductor who had charge of a train of cars on one of which the appellant was at the time a passenger. The complaint alleges that on July 4, 1906, the appellant, with his wife and two children, went on board one of the defendant's passenger trains at Tacoma, Wash., to be transported to Seattle; that he there paid the conductor the usual and customary fare for such transportation; that, under the rules and regulations of the company, he was entitled to a transfer from Seattle to Ballard; that when they arrived at Seattle the conductor struck the plaintiff in the face with a lantern which he was using in his business and work as conductor, and inflicted the injury for which damages are sought; that the only reason why the conductor struck the plaintiff was because the plaintiff asked the conductor for a transfer over the Ballard line. The defendant denied the material allegations of the complaint, and alleged an affirmative defense, which was denied by the plaintiff. After plaintiff had introduced his testimony and rested his case, defendant made a motion of nonsuit, claiming that the relation of common carrier and passenger had ceased to exist at the time the assault was committed. The court granted the motion, and judgment of nonsuit was entered.

The testimony of the appellant was to the effect that at the time he paid the fare to the conductor he asked him for a transfer on the Ballard car line, which he was entitled to under the rules of the company, and the conductor replied, saying, "I will give you that between Georgetown and Seattle;" that the appellant did not see the conductor as he was issuing transfers, and as the train rounded the corner of Yesler Way in Seattle, and while the conductor was standing on the back platform of the car upon which the appellant was situated, the appellant again asked for a transfer on the Ballard line, whereupon the following colloquy ensued: "He [the conductor] says: 'Why didn't you ask for a transfer when I was in the car to give a transfer?' 'Well,' I says, 'I didn't see you.' Then he told me to stand out to one side, because the train came to a stop at that time, and he was going down on the ground. Q. And then when it came to a stop what happened? A. He says to get out of the road for the passengers, and I stepped off, and I told him then—I says that I was told— Q. When you stepped off where did you go with reference to the train? A. I stood right by the side of him, right close. Q. Where was he? A. He stood on the step there, or on the side of the step—the handle of the car going in the— Q. How close to the car? A. He stood right up close to it, so he put his coat right up against the side, helping the passengers. Q. Off the car? A. Yes, sir. Q. And then you said to him what? A. I said to him that I was told that I was going to get a transfer



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between Georgetown and Seattle, and I says: 'I didn't see any of you in there.' He says: 'Don't bother me. I ain't got any time now.' And so I knew he was speaking in a very angry tone. Q. What was he doing at that time when you were talking to him? A. He was helping the passengers coming off of the car. Q. Well, then what happened between you and him after that? A. When they were all out I said to him, 'Am I entitled to a transfer on the Ballard line, or am I not?' And he says, 'Damn it, I told you before.' Q. He says what? A. He swore. Q. What did he say? A. He says, 'Damn it, I told you before,' he says, 'that I was in the car there,' he says, 'and why didn't you open your face then?' And I turned around and I says to him, 'I didn't see you in the car, and I don't believe you were in there.' And so I turned around and was going to the car, and he says, 'What is that?' and he came for me, and kind of raised up his left hand and struck me on the shoulder a little bit, and just only turned me around, and he says, 'What is that?' and I says, 'I didn't see you in the car, and I don't believe you were in there.' He says, 'Don't say that to me,' he says, and then he hauled off with his lantern and struck me right over the head. Q. With what? A. With a lantern, so the glass and everything was all over my face, and I fell down." This is the substance of the plaintiff's testimony.

The pertinent question in this case is whether the appellant was a passenger at the time of the alleged assault. Upon the determination of this question depends the other question, whether the conductor was acting within the scope of his employment at the time the assault was made. If he was, the company was responsible for his tortious acts. If he was not, it cannot be held responsible, for it is well settled that the liability of the master for intentional acts which constitute legal wrongs can only arise when the acts complained of are within the apparent scope of the master's business. It is equally well settled that, within such scope, the master is liable, for the contract on the part of the company is to safely carry its passengers and to compensate them for all unlawful and tortious injuries inflicted by its servants. It is contended by the respondent, and that was evidently the view taken by the trial judge, that in this instance the appellant had ceased to be a passenger at the time the assault was made upon him, and many cases are cited to sustain such contention. But an investigation of these cases convinces us that the decisions rendered were based upon an entirely different state of facts from the facts proven in this case. Booth on Street Railway Law, p. 445, is quoted as follows: "But the general rule, applicable alike to general traffic roads and street railways, that all parts of their stations, platforms, and the approaches thereto must be kept in a safe condition, cannot be extended so as to include the public street in which passengers are received and discharged, and over which the street railway company has no control. The street is in no sense a passenger station for the safety of which the company is responsible. When a passenger

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steps from a car upon the highway and terminates his relations and rights as a passenger, the company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk." This may be conceded to be the law, and it may be conceded that the distinction made between street railways and the ordinary steam railroad is a just one. The learned author further on bases the distinction upon the ground that the contractual relation is ended when the passenger alights from a street car, and that, if he again boards the car, he is responsible for another fare under another contract. But this reasoning is not applicable to the facts proven in this case, for it must be conceded that, under the contract made by the respondent, the appellant had not arrived at his destination when he alighted from the car in the city of Seattle, for he had paid for transportation to the city of Ballard. It was necessary for him to alight for the purpose of changing cars, and, to receive the benefit of his contract, it was necessary for him to travel outside of the car between the car from which he alighted and the Ballard car. The trip was a continuous one, and the fact that he had to change cars could not in justice or fairness affect his rights as a passenger. The learned author just quoted, after stating the rule, says: "Therefore the master is not liable for an act committed by his servant after he has stepped aside from his employment to commit a tort." Thus the act of a street car driver in making an assault on a passenger who had just left the car and gone to the sidewalk for the purpose of making a complaint at the company's office against the driver is not a tort for which the employer can be held responsible, although the assault was prompted by a quarrel between the driver and the passenger before the latter left the car." At first blush, this quotation might seem to sustain in a measure the respondent's contention. But the author cites to sustain the text *Central Railroad Company v. Peacock*, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425. An examination of that case shows a state of facts entirely different from those in the one at bar. There the plaintiff, after having been insulted by the conductor, got off at a stopping place, saying that he was going to the company's office to report the conductor. The car went on some distance after the plaintiff alighted, when it was stopped by the conductor, who left it, went across the street, and intercepted the plaintiff on the public sidewalk upon which he had been walking for a block or more, and the assault was there committed. The court, in the course of its comment, says: "After he had alighted and walked a square, could he resume his place in the car without paying another fare, without the assent of the conductor? Would the conductor be justified in omitting to charge another fare? We think not. Had he remained in the car until the stables were reached and the horses were being changed, the carrier would have understood his journey was not completed, and whilst the horses were being changed he would still have been regarded as a passenger, and would have been entitled to protection as against the employees,

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if he then had gone into the office to execute his declared purpose to report"—citing several cases to sustain that doctrine, which the court said was properly laid down. "Those cases," said the court, "only establish that, while the car or boat may actually stop, the passenger need not confine himself to the boat, car, or vehicle in order to preserve his relation and rights as a passenger, but that it is not the case here." It will be seen that the case cited which would have sustained the right of plaintiff to recover cannot be distinguished in principle from the case at bar. In one instance the horses were to be changed; in the other, cars were to be changed. In the one the plaintiff had the privilege of leaving the car and still maintaining his right as a passenger. In this instance he was compelled by the necessities of the case to alight from the car, therefore making a much stronger case in favor of plaintiff than the cases approved by the court in the case cited by respondent. The next case cited, viz., *Hanson v. Railway Company*, 75 Ill. App. 474, was where the plaintiff, while traveling on the car, had an altercation with the motorman about a personal matter entirely disconnected from the car service, and was assaulted by the motorman. After the assault, plaintiff remained in his seat until he arrived at his destination, when he got off with safety on the public street, and while he was approaching the sidewalk the motorman got off on the opposite side of the car, followed him up, and again assaulted him. The action brought consisted of two counts, one for the assault made while on the car, and the other for the assault made on the street, and the appellate court allowed him to recover on the first count only, saying: "We hold under the evidence in this case there should be no recovery under the second count in the declaration. When the plaintiff in error arrived at his destination and safely alighted from the car on the public street, that then the contract of carrier and passenger was at an end." There is certainly no parallel between the two cases. In this case the plaintiff had not arrived at his destination. On the contrary, it was his request to be taken to his destination under the terms of his contract which was the subject of the controversy. The next case, viz., *Palmer v. Winston-Salem Ry. & Elec. Co.*, 131 N. C. 250, 42 S. E. 604, is also a case where the plaintiff had arrived at his destination and had got off the car and deposited his bundles on the sidewalk, then returned to the car and resumed the altercation with the motorman, and again got off the car, when the motorman followed him up and assaulted him. No comment seems to be necessary on this case. An excerpt from the opinion of the court, however, shows what the decision would have been if the facts presented had been similar to the facts in this case: "If the plaintiff had been a passenger, or his passage had not been fully terminated, or if, when he left the car at his destination, the employee had assaulted him, the defendant concedes that there would be no question as to the liability of the company"—citing *Daniel v. Railroad Company*, 117 N. C. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879;

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*Strother v. Railroad Company*, 123 N. C. 197, 31 S. E. 386. But said the court: "Here the passage had terminated, for the passenger had deposited his bundle and then returned to the car." And without specially reviewing the other cases cited, we find them all to be of the same character as those above noticed. A case more directly in point is *Wise v. Covington & Cincinnati Street Ry. Co.*, 16 S. W. 351, 13 Ky. Law. Rep. 110, where it was held that a street railway company is liable for assault by the driver upon a passenger after the latter has left the car on account of the insults of the driver, where the assault was a direct continuance of the abuse begun on the car. In this case, as above indicated, appellant had not arrived at his destination, and the assault was a direct continuance of the controversy begun on the car.

Respondent seems to place some stress upon the fact that there had been no angry words passed between the appellant and the conductor on the car. The fact that the appellant in demanding his rights had demeaned himself in a gentlemanly manner, and had not precipitated a row in the car, should not militate against his right to recover. He did only what he was compelled to do to urge his rights. When he made a request for the transfer, the conductor told him to get off the car and out of the way, as he was busy helping the passengers off. This he did. He did not leave the car. Did not show any inclination or make any intimation that he was intending to leave it, but remained and persistently demanded his rights. We think, under all authority and in accordance with principles of right, that the appellant should be deemed a passenger at the time of the assault, and should be allowed to recover.

The judgment will be reversed, with instructions to overrule the motion for nonsuit.

HADLEY, C. J., and RUDKIN, MOUNT, FULLERTON, and ROOT, JJ., concur.

ST. LOUIS & S. F. R. CO. *v.* WYATT.

(Supreme Court of Arkansas, Oct. 28, 1907.)

[105 S. W. Rep. 72.]

**Master and Servant—Liability for Servant's Torts—Scope of Employment.\***—Where a switchman, who is off duty, suddenly assaults a person intending to become a passenger, the carrier is not liable as the act is beyond the scope of his employment.

**Same—Sudden Assault.\***—A carrier is not liable to a person intending to become a passenger for an assault by a switchman acting beyond the scope of his employment, where the assault was so sudden that the carrier could not have reasonably anticipated and prevented it, or stopped it after it commenced.

**Same—Arrest—Scope of Employment.†**—A carrier is not liable for an arrest made by its special agent who had no authority to make arrests.

**Same—Probable Cause.†**—Where a special agent acting in the scope of his employment causes the arrest of a person, the carrier is not liable if such agent exercised ordinary care, and there was probable cause for having such person arrested.

**Same—Probable Cause—Question for Jury.**—In an action against a carrier for false imprisonment, held, that the question whether there was probable cause to believe that plaintiff had committed the crime of larceny for which he was arrested was for the jury.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by Bertie Wyatt against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

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\*For the authorities in this series on the question whether the master's liability for the negligence or torts of his servants depends upon whether they occurred while the servant was acting within the scope of his employment, see foot-notes appended to *Southern Ry. Co. v. Power Fuel Co.* (C. C. A.), 24 R. R. R. 800, 47 Am. & Eng. R. Cas., N. S., 800; *Louisville & N. R. Co. v. Gillen* (Ind.), 24 R. R. R. 511, 47 Am. & Eng. R. Cas., N. S., 511; *Roberts v. Southern Ry. Co.* (N. Car.), 22 R. R. R. 106, 45 Am. & Eng. R. Cas., N. S., 106.

For the authorities in this series on the subject of the liability of the carrier for assaults on its passengers by its employees, see foot-notes appended to *Ford v. Minneapolis St. Ry. Co.* (Minn.), 21 R. R. R. 182, 44 Am. & Eng. R. Cas., N. S., 182; foot-notes appended to *Garvick v. Burlington, etc., Ry. Co.* (Iowa), 20 R. R. R. 496, 43 Am. & Eng. R. Cas., N. S., 496; foot-notes appended to *Foster v. Grand Rapids Ry. Co.* (Mich.), 17 R. R. R. 512, 40 Am. & Eng. R. Cas., N. S., 512.

†See foot-note appended to *Schmidt v. New Orleans Ry. Co.* (La.), 24 R. R. R. 156, 47 Am. & Eng. R. Cas., N. S., 156; *Davis v. Chesapeake & O. Ry. Co.* (W. Va.), 23 R. R. R. 1, 46 Am. & Eng. R. Cas., N. S., 1.

## St. Louis, etc., R. Co. v. Wyatt

The requested instructions referred to in the opinion were as follows:

“(2) I charge you that the evidence is not sufficient to warrant a recovery under the first cause of action set forth in the complaint. You will therefore find for the defendant on said first cause of action.

“(3) I charge you that the evidence is not sufficient to warrant a recovery on behalf of plaintiff in the second cause of action. You will therefore find for the defendant in the second cause of action.”

“(5) I charge you that the second cause of action is for an alleged unlawful imprisonment. To sustain this cause of action it is necessary for plaintiff to prove: (a) That the arrest was procured by Special Agent Penn, an employee of the company, acting within the scope of his employment. If the proof fails to establish this, you will find for defendant. (b) The plaintiff must prove that the Special Agent Penn had no reasonable or probable cause for believing that plaintiff had stolen the coat.”

*W. F. Evans* and *B. R. Davidson*, for appellant.

*Sam R. Chew*, for appellee.

WOOD, J. Bertie Wyatt, a young man 19 years old, in company with Arthur Ward, another young man, on the 15th of October left his home to attend a circus at Ft. Smith. He carried with him a black slicker. After the circus they went to the depot to purchase a ticket to Van Buren over appellant's road. Appellee asked the ticket agent when the train was due, and he replied at 6 o'clock, but informed appellee that the train was an hour and a half late. Appellee then left the ticket office without purchasing his ticket, went out of the door, met some companions not far from the door and near the corner of the building, and was standing leaning against the wall, talking to these parties, when one Davis, a switchman in the employ of appellant, came up and began cursing the appellee, and accused him of stealing his slicker, and pounded him over the head with his lantern. He hit appellee over the left eye, made a wound which bled profusely, and knocked appellee down. Appellee ran around the tracks on the platform, all the while calling for help, the man still after him, and pounding him with the lantern, and almost knocking appellee senseless. Appellee then ran into the waiting room and back to the water between the ticket office and the stairs; when and where a man by the name of Penn came and took hold of appellee's arm, and carried him into the baggage room, where there was a policeman, and Penn told the policeman to take charge of appellee. Penn told the policeman it was for "suspicious larceny" or something of the kind about the slicker. He said to the policeman: "Take these young men. They are charged with stealing a man's coat." The policeman carried appellee and his companion, Arthur Ward, to jail, where they remained for 12 or 16 hours. Appellee had the money to purchase his ticket and intended to do so, and to take the appellant's passenger train to Van Buren.



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Penn was appellant's special secret service agent. It was his duty to look after criminal matters for the appellant. He looked after anything that was stolen out of the box cars or the stations. He had authority to inquire into complaints of larceny about the station. When any trouble came up about the station, it was his duty to investigate the facts, and report the matter to the civil authorities. He had no power to make arrests himself. That was not in the line of his duty; but he was expected to report matters to the officers when trouble came up, and in this way he caused arrests to be made. Davis the switchman, who did the injury to appellee, was off duty at the time. He had quit work. He worked on the yards, and had no control over the station or passengers. It was his duty to look after switches. He had a black slicker, and on missing it from his engine he started out through the crowd to look for it, and when he came upon appellee with the slicker he supposed it was his, and began to pound appellee in the manner described. Davis was also arrested by the policeman, but was not put in jail, but simply directed to appear before the police court. The ticket agent made no effort to stop the fight, but he testified that he had no opportunity to do so. When the trouble first began, however, some one in the ticket office told the special secret service agent Penn that there was about to be a fight or trouble on hand, and that he "had better get busy." Appellee was discharged by the police court from the charge of larceny. The above are substantially the facts stated in brief (and in the strongest light for appellee) upon which he predicates his suit against appellant for an assault and false imprisonment.

First. A majority of the court is of the opinion that these facts do not constitute a cause of action against appellant. Davis, the switchman who made the assault, was acting entirely beyond the scope of his employment in so doing, and the appellant was in no manner chargeable with his unlawful acts. Nor was appellant liable under the proof for failing to exercise ordinary care to protect its passengers and those intending to become passengers from insults and injuries of the kind here complained of. The assault upon appellee was so sudden that appellant could not have reasonably anticipated and prevented it: nor, in the exercise of ordinary care, have done more than it did to quell the trouble after it began. Appellant's secret service agent was on the ground. It was his duty to have prevented the trouble, if possible. He testifies: "Was in Ft. Smith on the day of the circus. Was at the station. Heard some disturbance. I was in the ticket office at the time. Was talking over the telephone. Mr. Milligan and Mr. Robinson were in the office. They looked out the window and said 'There is a fight or something out here, and you had better get busy.' I hung up the receiver, and started promptly and met one of these young men at the waiting room door, and noticed he had some blood on his face and hands, and said, 'What is the matter?' and he said a man struck him with a lantern." Other witnesses show that the

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crowd was dense, and the attack so sudden they could not have prevented it had they tried. This evidence is undisputed, and it shows that the rencounter was on and off so quickly, that the failure of appellant to prevent it, or to stop it after it commenced, was not actionable negligence. A majority of the court is of the opinion that the court should have given appellant's second request for instruction. (Reporter set forth in note.)

Second. We are of the opinion that the undisputed evidence shows that the special agent, Penn, had no authority to make arrests, and that, if he arrested appellee, he acted beyond the scope of his employment, and the appellant company is not liable therefor. Even if it may be said that appellee was arrested at his instance and request, and that such arrest was in the line of the special agent's employment, appellant would not be liable therefor, provided its special agent exercised ordinary care, and there was probable cause for having appellee apprehended. There was certainly evidence to warrant the submission of the question to the jury as to whether or not there was probable cause to believe that appellee had committed the crime of larceny. The court erred in refusing to give appellant's third request for instruction. (Reporter set forth in note.) The court, having refused this instruction, should certainly have given subdivisions "a" and "b" of appellant's fifth request for instruction. (Reporter set forth in note.)

For the errors indicated, the judgment is reversed and the cause is remanded for new trial.

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**LANE v. CHOCTAW, O. & G. R. Co.**

(Supreme Court of Oklahoma, Sept. 5, 1907.)

[91 Pac. Rep. 883.]

**Pleading—Amendment of Petition—Operation and Effect.**—Where an amended petition is filed in a cause, and no part of the original petition is referred to or adopted into the amended petition, such original petition is superseded, and is no part of the record; and while it may be introduced in evidence by the adverse party, the same as any other writing signed by the party, subject to be explained, its contents cannot be considered upon the trial, either as part of the record or as admissions of the plaintiff, unless introduced in evidence.

**Carriers—Carriage of Passengers—Pleading—Rules and Regulations.**—Where the plaintiff sues a carrier of passengers for injuries alleged to have been received by him by the negligence of the carrier while riding on a baggage car, the carrier must plead its rules and regulations relating to passengers and where they may ride, and allege the violation thereof by the plaintiff, if it desires to avail itself of such a defense.

**Same—Personal Injuries—Contributory Negligence.**—It is not, under our statutes, negligence per se for a passenger on a mixed railroad train to occupy a seat in a baggage car.

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**Same—Performance of Contract—Accommodations.\***—It is the duty of a carrier of passengers for reward to provide fit and suitable accommodations for all the passengers that it receives and attempts to transport, and “proper accommodations” means seats such as are usually provided and in use in a vehicle intended for the transportation of passengers.

**Same.\***—A carrier of passengers for hire is not allowed to overcrowd its vehicles or cars, and a passenger who goes upon a train for passage is not negligent in occupying a position in the baggage compartment of a combination car, where there are no unoccupied seats in the passenger compartments or coaches.

**Same.†**—In order to absolve itself from liability for injuries to a passenger riding in its baggage car, the carrier must adopt and post in a conspicuous place in its passenger cars printed rules and regulations forbidding or warning passengers not to ride in such baggage car, and must, in addition to such notices, provide such passenger with proper accommodations in the passenger cars.

**Same—Question for Jury.**—Where a carrier is operating a mixed train, and a passenger goes upon such train with his ticket for passage, and finds no vacant seats in the passenger cars, or there are no printed rules posted in the passenger coaches in such train warning passengers not to ride on baggage cars, it is not negligence for such passenger to take a seat in a baggage car; and the questions of whether the train was overcrowded or the rules posted, if controverted, are questions for the jury, and not the court.

**Trial—Direction of Verdict.**—Where there is a material controverted question of fact upon which reasonable minds might fairly come to different conclusions, it is error for the court to direct a verdict.

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; before Justice B. F. Burwell.

Action by Lewellen C. Lane against the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial ordered.

The plaintiff in error, L. C. Lane, commenced his action in the district court of Pottawatomie county against the Choctaw, Oklahoma & Gulf Railroad Company for the purpose of recovering damages for injuries alleged to have been caused by the negligence of the defendant's servants in the operation of a railway train upon which he was a passenger in May, 1902. The Choctaw,

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\*See extensive note, 4 R. R. R. 486, 27 Am. & Eng. R. Cas., N. S., 486; extensive note, 4 R. R. R. 217, 27 Am. & Eng. R. Cas., N. S., 217.

†For the authorities in this series on the subject of negligence in allowing passengers to expose themselves to danger, see foot-notes appended to *Thompson v. Gardner, etc., Ry. Co. (Mass.)*, 21 R. R. R. 480, 44 Am. & Eng. R. Cas., N. S., 480; foot-notes appended to *Hawkes v. Boston Elev. Ry. Co. (Mass.)*, 21 R. R. R. 286, 44 Am. & Eng. R. Cas., N. S., 286.

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Oklahoma & Gulf Railroad Company was at that time a common carrier of freight and passengers by steam railway between the stations of Tecumseh and Shawnee, in Pottawatomie county, Okl., as well as to other points, both north and south of said stations. On the day of the alleged accident the company was operating a mixed train, composed of different cars for passengers, baggage, and freight, and the plaintiff purchased a ticket at the railway station at Tecumseh, and at the proper time boarded the train with a number of other passengers, and, observing no unoccupied seat in the compartment intended for passengers, went into a compartment used for transporting baggage and took a seat upon a box therein located. The car in which he took passage was a combination car, one portion or end of which was regularly provided with seats for passengers, and the other portion or end was used for baggage. There was a door opening between the two compartments. The train started north from Tecumseh station towards Shawnee, and the plaintiff and several other passengers were occupying the baggage compartment of the combination car. Whether there was a separate passenger coach in the train, in addition to the combination coach, was a disputed question of fact on the trial; there being evidence both ways on the subject. The train ran about a quarter of a mile, and then stopped. The engine was detached from the train and ran onto a switch, where it picked up three or four freight cars, either flat or box, conveyed them onto the main line, and coupled them to the cars containing the passengers. When the engine backed up with the freight cars attached to make the coupling onto the passenger cars, it is claimed that they were struck with such speed and force as to pitch the plaintiff off the box upon which he was seated, thereby causing certain injuries to one of his limbs, which developed into such a diseased condition as to require his leg to be amputated; and for his suffering, loss of limb, and expense of sickness and treatment, he brings this action, based upon the alleged negligence of the railway company in operating its train. The amended petition sets out the facts specifically and at length. The company answered by a general denial, coupled with an averment, in general terms, of contributory negligence on the part of the plaintiff. The plaintiff replied by general denial. The case was tried to a jury, and after all the evidence was introduced by both sides the court directed a verdict for the defendant and entered judgment of nonsuit. The plaintiff brings the cause here on petition in error.

*Blakeney & Maxey* and *W. B. Crossan*, for plaintiff in error.

*C. B. Stuart* and *Thos. R. Beman*, for defendant in error.

BURFORD, C. J. (after stating the facts as above). We are advised that the trial court held, as a matter of law, that by going into the baggage compartment and riding there the plaintiff was guilty of such negligence *per se* as would prevent a recovery of damages. Preliminary to a discussion of this question, there are some questions of practice which arose upon the trial that should be settled.

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The plaintiff filed an original, a first, and a second amended petition. In the original petition it is averred that the train upon which plaintiff took passage was a mixed train, composed of one passenger coach, one combination passenger and baggage coach, several box or freight cars, and a locomotive. In the amended petitions the averment is made that the train consisted of one combination passenger and baggage car, certain freight cars, and one locomotive. It is stated in the brief of plaintiff in error that the trial court, in deciding the case, held that the averment in the original petition that there was a passenger coach in the train was an admission by the plaintiff against his interest, and was conclusive against him and not subject to explanation or controversy. The original pleading was not introduced in evidence. The rule stated is one that applies to the pleadings upon which the case is submitted for trial. In the case of *Lane Implement Co. v. Lowder & Manning*, 11 Okl. 61, 65 Pac. 926, this court, in discussing a similar question, stated the law to be that "where a party to an action makes solemn admissions against his interest in a pleading, in the absence of mistakes on his part or on the part of his counsel who inserted them in such pleading, a court, in passing upon the sufficiency of a subsequent amended pleading filed by him, should take such admissions into consideration and treat them as admitted facts in the case." No authority is cited supporting this rule. It is probably stated too broadly, and is subject to some modification. The rule as stated *supra* is correct as applied to an amendment to a pleading; but the general rule is that an original pleading is superseded, and its effect as a pleading destroyed, by filing an amended pleading which is complete in itself and does not adopt any of the former pleading by reference. 1 Enc. Pl. & Pr. 625. In any case a distinction should be made between an admission and an allegation. One is in the nature of a confession of a fact averred by the adverse pleader. The other is an averment against the adverse pleader, which must be supported by proof. The authorities are not at all harmonious as to the effect to be given upon the trial to superseded pleadings. A few courts, and principally California, seem to have adopted the rule that a pleading which has been withdrawn by an amended pleading cannot be considered for any purpose on the trial; it being considered unjust to hold a party bound by statements which may have been inserted by inadvertence or mistake, and which he has voluntarily abandoned by filing a new pleading. *Barber v. Reynolds*, 33 Cal. 497; *Kelly v. McKebben*, 54 Cal. 192; *Mecham v. McKay*, 37 Cal. 154; *Pence v. McElvy*, 51 Cal. 222; *Kentfield v. Hays*, 57 Cal. 409; *Pfister et al. v. Wade et al.*, 69 Cal. 133, 10 Pac. 369. But such superseded pleadings may be used for impeachment purposes, when relevant. In *re O'Conner's Estate*, 118 Cal. 69, 50 Pac. 4. In *Smith v. Pelott et al.*, 63 Hun, 632, 18 N. Y. Supp. 301, it was held that upon the trial the averments of the superseded pleadings could be considered, whether introduced in evidence or not; but this rule has but little support. The weight



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of authority and better-reasoned cases support the rule that a pleading, or an admission or allegation in a pleading, notwithstanding it may have been withdrawn, stricken out, or superseded by an amended pleading, is competent in evidence, and may be introduced against the party from whom it proceeded, like any other admission or declaration, subject, however, to explanation by the party who made it. This rule rests on the general principle that whatever a party has said about his case may be proved against him, and whatever writing he has signed or authorized may be, if relevant, introduced against him, the weight of such evidence to be left to the court or jury trying the case. Abbott's Trial Brief (2d Ed.) pp. 296, 297; Solomon Ry. Co. v. Jones, 30 Kan. 601, 2 Pac. 657; Reihl v. Likowski, 33 Kan. 515, 6 Pac. 886; Jockets v. Borgman, 29 Kan. 109, 44 Am. Rep. 625; Brown v. Pickard, 4 Utah, 292, 9 Pac. 573, 11 Pac. 512; Kilpatrick D. G. Co. v. Box, 13 Utah, 494, 45 Pac. 629; Barton v. Laws, 4 Colo. App. 212, 35 Pac. 284; Schad v. Sharp, 95 Mo. 573, 8 S. W. 549; Stone v. Cook, 79 Ill. 424; Hall v. Woodward, 30 S. C. 564, 9 S. E. 684; B. & O. & C. R. Co. v. Evarts, 112 Ind. 533, 14 N. E. 369; Ludwig v. Blackshere, 102 Iowa, 366, 71 N. W. 356; Jeneau v. Stunkle, 40 Kan. 756, 20 Pac. 473; Walser v. Wear, 141 Mo. 443, 42 S. W. 928; Woodworth v. Thompson, 44 Neb. 311, 62 N. W. 450; Strong v. Dwight, 11 Abb. Prac. N. S. (N. Y.) 319; Willis v. Tozer, 44 S. C. 1, 21 S. E. 617; Goodbar Show Co. v. Sims (Tex. Civ. App.) 43 S. W. 1065; Or. R. R. & Nav. Co. v. Ducres, 1 Wash. St. 195, 23 Pac. 415; Lindner v. St. Paul F. & M. Ins. Co., 93 Wis. 526, 67 N. W. 1125; Daub v. Engleback, 109 Ill. 267; Folger v. Boyington, 67 Wis. 447, 30 N. W. 715; Vogel v. Osborn, 32 Minn. 167, 20 N. W. 129. In this case the superseded petition was not introduced in evidence, and its contents were not proper to be considered, either as admissions of record or as evidence in the case. The rights of the parties should have been determined upon the averments contained in the pleadings upon which the cause proceeded to trial, regardless of any former pleadings, unless properly offered and admitted in evidence.

Another question of practice relates to the question of pleading. The defendant, prior to the trial, asked for leave to file an amended answer, in which the company alleged compliance with the statutory regulations requiring rules and regulations to be posted in the passenger cars and the violation of such rules by the plaintiff. This plea was in the nature of confession and avoidance, or by way of justification. The court refused the request to file the amended answer, and the case went to trial upon the issues made by the defendant's general denial and plea of contributory negligence, which was denied by the plaintiff. Upon the trial the court, over the objection of the plaintiff, permitted the defendant to offer evidence tending to show that it had posted on the baggage room door a warning, and that the company had issued to its trainmen printed regulations, relating to the prevention of passengers riding upon the platform and in



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baggage cars. This evidence was not admissible under the issues formed, and it was error to admit it. It has been held that, in order to entitle the carrier to make the defense that it has adopted and promulgated rules and regulations which the passenger has violated, it must plead its rules and allege the facts which constitute the defense; and we think this a sound rule of practice. *Sherman v. Hannibal & St. Joe R. R. Co.*, 72 Mo. 62, 37 Am. Rep. 423; *Weymouth v. Broadway, etc., R. R. Co.*, 142 N. Y. 681, 37 N. E. 825; *Vail v. Broadway, etc., R. R. Co.*, 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626.

The question as to whether the court rightfully took the case from the jury and decided as a matter of law that the plaintiff was guilty of such contributory negligence as would prevent a recovery is the controlling one in this case. It is uncontroverted that the plaintiff was a passenger upon the defendant's train. The train was a mixed train, carrying both freight and passenger cars. The plaintiff went into the baggage compartment of the combination coach, and there took a seat upon a box, and there remained until he was hurt, after which he got onto a flat car and rode. No one in charge of the train either directed him into the baggage car or objected to his occupying the same. There were a number of other passengers occupying the baggage car at the time. It was the custom for passengers to occupy the baggage compartment between the stations of Tecumseh and Shawnee, and the conductor took fare from those in such car and made no objections to their riding there. The plaintiff had a ticket when he went upon the train to take passage to Shawnee, but his ticket was not taken up until after the accident. There was printed upon the door between the passenger and baggage car the words "No admittance." The door was standing open, and when open, these words were not visible to one in the passenger compartment. The company had printed rules and regulations forbidding employees to allow passengers to ride in the baggage car. There was no proof of any rules or regulations being posted in the passenger coach or compartments for passengers in the train. It was a controverted question of fact as to the number of passengers on the train. It was a controverted question as to whether there was a passenger coach in the train in addition to the combination car. It was a disputed question as to whether the train was crowded, and whether there were any vacant seats in the passenger compartments, at the time of the accident. It was a disputed question as to whether the plaintiff could have found a seat, had he gone through the train. The combination car, in which plaintiff rode and was hurt, was the rear car in the train. There was nothing in the position occupied by plaintiff in the baggage car that could in any manner have contributed to his injury, except the fact that he was not sitting in a seat intended for occupancy by passengers. Upon the foregoing state of facts, what was the duty of the court?

Several of our state courts hold to the doctrine that a passenger is entitled to a seat in a passenger coach, and if he fails to

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occupy such seat, and occupies a place not intended for passengers, he is guilty of negligence *per se*, and is precluded from recovery, if injured while occupying such position; that he may demand a seat, and, if the carrier fails to provide him with one, he may retire from the train and maintain an action against the carrier for damages. This may be the safe and conservative rule; but it is not the practical one. Passengers arrange for their dates of travel, and arrange for their business at their destination. They arrange for train and business connections, and have a right to rely upon the business of the carrier, when they purchase a ticket or engage passage, to receive them at the proper time and place, to provide them with necessary and usual accommodations, to transport them upon usual and regular trains, and deliver them at the destination their ticket calls for; and if, upon entering the train as a passenger, they find it overcrowded and no seats unoccupied, they have the right to seek the next most available place, the one that reasonably offers the place of greatest safety, and with proper caution occupy the same until the carrier shall provide them with better. Our Legislature, following the example of some of the older states, recognized this right at an early period of our territorial existence, and enacted statutory provisions which, in a great measure, control the determination of the question before us. These provisions are as follows:

Wilson's Rev. & Ann. St. 1903, § 657: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

Section 658: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."

Section 659: "A carrier of persons for reward must not overcrowd or overload his vehicle."

Section 660: "A carrier of persons for reward must give to passengers all such accommodations as are usual and reasonable, must treat them with civility, and give them a reasonable degree of attention."

Section 712: "A common carrier of persons must provide a sufficient number of vehicles to accommodate all the passengers who can be reasonably expected to require carriage at any one time."

Section 713: "A common carrier of persons must provide every passenger with a seat. He must not overload his vehicle by receiving and carrying more passengers than its rated capacity allows."

Section 714: "A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them, if they are lawful, public, uniform in their application, and reasonable."

Section 1050: "In case any passenger on any railroad shall

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be injured while on the platform of a car while in motion, or in any baggage, wood or freight car, in violation of the printed regulations of the corporation, posted up at the time in a conspicuous place inside of its passenger cars, then in the train, such corporation shall not be liable for the injury; provided, it had furnished room inside its passenger cars sufficient for the accommodation of its passengers."

Section 1051: "When fare is taken by any railroad corporation for transporting passengers on any mixed train of passenger and freight cars, or on any baggage, wood, gravel or freight car, the same care must be taken and the same responsibility and duties are assumed by the corporation as for passengers on passenger cars."

When the plaintiff purchased his ticket and paid his fare to the station agent at Tecumseh, he was a passenger for reward, and entitled to transportation upon the defendant's train from Tecumseh to Shawnee; and it was the duty of the railway company to provide him a suitable vehicle in which to ride, safe and fit for the use, to provide him with such accommodations as were usual and reasonable, to provide him with a seat and give him a reasonable degree of attention, and no degree of care would excuse any default in this respect. The railway company was a carrier of persons for hire or reward, and was operating a mixed train, consisting of passenger and freight cars, upon which it received the plaintiff as a passenger. In such case the law required of the carrier the "utmost degree of care and diligence for his safe carriage," and imposed upon it the same responsibility and duty as for carrying passengers upon passenger cars. It is true the carrier is permitted to make rules and regulations for the conduct of its business, and if such rules are lawful, are public, reasonable, and uniform in their application, may require the passengers to obey them. The manner of making such rules public, so as to charge passengers with notice thereof, is prescribed by the statute,—they must be "posted up at the time in a conspicuous place inside of its passenger cars then in the train." If such regulations are so posted, and the passenger is injured while violating such reasonable rules, then such passenger cannot recover, provided the carrier had furnished room inside its passenger cars sufficient for the accommodation of its passengers. The statute exempts the carrier from liability for injuries to a passenger, when injured on a platform or in a baggage car, when it has performed two conditions, viz.: Posted up in its passenger cars in a conspicuous place printed regulations forbidding the passenger to occupy such places, and provided him with sufficient accommodations in its passenger coaches. It necessarily follows that if the carrier has failed in either of these requirements, and the passenger is injured by the negligence of the carrier while riding upon the platform or in the baggage car, the carrier is liable for such injuries.

Whether the statute relating to the liability of carriers for injuries to passengers upon platforms or in baggage cars is an

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adopted one we are not advised, but an examination of the adjudicated cases discloses that the states of New York and Missouri each have statutes identical in language with ours. They have been in force in those states for more than half a century and have received uniform construction. It is held in both states that it is the duty of the carrier, if it has adopted rules and regulations respecting the carrying of persons upon the platforms of cars or upon baggage cars, that in order to charge the passenger with the observance of such rules they must be printed and must be posted up in the passenger cars in such conspicuous place as will be observable to passengers within the cars; that no mere words or warnings will fill the requirement of this statute, but the printed rules or regulations must be actually posted; also, that the carrier must provide the passenger with a seat in its passenger cars, and that if any of the seats are occupied with luggage, or one passenger is occupying more than one seat, he is not bound to request such obstructions removed, but may seek some other unoccupied place. *Nolan v. Brooklyn, etc., R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345; *Werle v. Long Island R. Co.*, 98 N. Y. 650; *Willis v. Railroad*, 34 N. Y. 670; *Weymouth v. Boardway, etc., Co.*, 2 Misc. Rep. 506, 22 N. Y. Supp. 1047; *Merwin v. Manhattan Ry. Co.*, 113 N. Y. 659, 21 N. E. 415; *Graham v. Manhattan Ry. Co.*, 149 N. Y. 336, 43 N. E. 917; *Morrison v. Erie R. R. Co.*, 56 N. Y. 307; *Schaefer v. Union Ry. Co. (Sup.)* 51 N. Y. Supp. 431; *Weymouth v. Broadway, etc., Co.*, 142 N. Y. 681, 37 N. E. 825; *Vail v. Broadway, etc., Co.*, 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626; *Sherman v. Hannibal & St. Joe R. R. Co.*, 72 Mo. 62, 37 Am. Rep. 423; *Wagner v. Mo. Pac. Ry. Co.*, 97 Mo. 512, 10 S. W. 386, 3 L. R. A. 156; *Berry v. Mo. Pac. Ry. Co.*, 124 Mo. 223, 25 S. W. 229; *Gerstle v. U. P. Ry. Co.*, 23 Mo. App. 361; *Chaney v. L. & M. Ry. Co.*, 176 Mo. 598, 75 S. W. 595; *Higgins v. Han. & St. Joe R. R. Co.*, 36 Mo. 418; *Choate v. Mo. Pac. Ry. Co.*, 67 Mo. App. 105. The rule deduced from these cases; under statutory provisions like ours, is that it is not negligence *per se* for a passenger to ride upon a platform of a moving car, or in a compartment not intended for the use of passengers, where the trains are overcrowded, or he cannot without great danger or difficulty find a seat in a passenger coach, even though the carrier has provided coaches for its passengers and has posted notice of its rules and regulations; that in case of injury to a passenger while on a platform or in a baggage car the question of the passenger's negligence in occupying such place is one of fact to be determined by the jury.

But notwithstanding these statutory provisions, which are plain and controlling, we think the great weight of modern and well-considered cases supports the doctrine that, if the train is crowded, it is not negligence *per se* for the passenger to occupy the platform or baggage car, and the question as to whether he was justified in assuming such risk is one for the jury. It

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is said in Hutchinson on Carriers (3d Ed.) § 1198: "If, however, the railway company has permitted the car to be overcrowded, the passenger will not as a matter of law be chargeable with negligence in riding upon the platform, and the question whether in any particular case he was justified in doing so will ordinarily be one of fact for the jury. But when the car is overcrowded, and in consequence the passenger is obliged to ride upon the platform, he must exercise for his safety a degree of care commensurate with the increased danger usually incident to such an exposed place, and if he fails to do so, and injury results, his conduct will preclude him from the right of recovery. While there are cases which hold that the passenger will be justified in riding upon the platform if he is unable to obtain a seat in the car, the better rule would seem to be that if there is standing room within the car he should stand inside, rather than expose himself to peril by riding upon the platform. He is not required, however, to disregard the usual courtesies of life in order to get an advantage over other passengers in securing a place within the car. If, therefore, the car should be so crowded that the passenger, in the exercise of reasonable prudence, would be justified in concluding that he could not get inside without unreasonably pushing or crowding his way, he would be under no duty to attempt to enter, and it would not be negligence for him, under such circumstances, to ride upon the platform." Our statute places the riding upon the platform and in a baggage car under the same rule.

Judge Thompson, in his masterful work on the Law of Negligence (2d Ed., vol. 3, § 2958), says: "Upon the question whether contributory negligence is to be ascribed to a passenger who is hurt while riding in the baggage or express car, under such circumstances that he would not have been hurt if he had remained in a passenger car, there is considerable conflict of judicial opinion. It is no doubt a reasonable regulation that passengers shall not ride in the baggage car. The safety of the passengers, the impeded discharge of duty by the company's servants, and the security of the property conveyed therein, are considerations in support of this rule. Moreover, all passengers are probably aware that the hazards of travel are increased by riding in this portion of the train. *Prima facie*, therefore, a passenger who, unless excused by special circumstances, elects to ride in the baggage car instead of remaining in one of the passenger coaches—assuming that there is room for him—commits an impropriety of such a character that, in case he is injured while so riding and the circumstances are such that he would not have been injured if he had remained in one of the passenger coaches, he will be precluded from recovering damages from the company, unless it appears that he is riding there by permission of the conductor for the benefit of the company." It will be observed that Judge Thompson holds that the passenger riding in the baggage car is guilty of indiscretion, and *prima facie* negligent, when he elects to ride in the baggage car, when there is



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room for him in the passenger coach, and, unless excused by special circumstances, such as riding there with the permission of the conductor for the benefit of the company, or where the regulations are habitually disregarded, or it is customary to convey and accept fare or tickets from passengers in the baggage car without objection by those having the management of the train. The rule that the passenger will not be guilty of negligence *per se* by riding upon the platform or in the baggage car, when the platforms or passenger cars are crowded, or when he is unable to observe any vacant seats, but that the question as to whether he acted under all the circumstances as a reasonably prudent man would have acted, and whether the position he occupied at the time of the accident was one of increased risk, or in fact bore any causal relation to the injury, is supported by the following authorities, in addition to those cited *supra*: Hardenbergh v. St. P. & M. R. R. Co., 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610; Thrope v. N. Y. C. & H. R. R. R. Co., 76 N. Y. 404, 32 Am. Rep. 325; St. L. & I. M. Ry. v. Leigh, 45 Ark. 368, 55 Am. Rep. 558; Louisville, N. O. & Tex. Ry. v. Patterson, 69 Miss. 421, 13 South. 697, 22 L. R. A. 259; Jacobus v. St. Paul, etc., Ry., 20 Minn. 134 (Gil. 110), 18 Am. Rep. 360; C. & O. Ry. v. Jordan (Ky.) 76 S. W. 145; Kentucky Central Ry. v. Thomas, 79 Ky. 160, 42 Am. Rep. 208; Morgan v. L. S. & M. S. Ry., 138 Mich. 626, 101 N. W. 836, 70 L. R. A. 609; Lynn v. So. Pac. Ry., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; McGuire v. Middlesex Ry. Co., 115 Mass. 239; L. S. & M. S. Ry. Co. v. Kelsey, 180 Ill. 530, 54 N. E. 608; Chicago & Western Ind. Ry. v. Newell, 212 Ill. 332, 72 N. E. 416; Benedict v. Mil. & St. P. Ry., 86 Minn. 224, 90 N. W. 360, 57 L. R. A. 639, 91 Am. St. Rep. 345; Lynn v. So. Pac. Ry. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; Bonner *et al.* v. Glenn, 79 Tex. 531, 15 S. W. 572; C. & A. Ry. v. Fisher, 141 Ill. 614, 31 N. E. 406; C. & O. Ry. v. Lang's Adm'r, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; Graham v. Receiver, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. Rep. 121; Marquette v. C. & N. Ry. Co., 33 Iowa, 564; Penn. Ry. Co. v. Paul, 126 Fed. 157, 62 C. C. A. 135; Dennis v. Pittsburgh, etc., Ry. Co., 165 Pa. 624, 31 Atl. 52; G., H. & San A. Ry. Co. v. Morris, 94 Tex. 505, 61 S. W. 709; Trumbull, Rec., v. Erickson, 97 Fed. 891, 38 C. C. A. 536; Highland Av. & B. R. R. v. Donovan, 94 Ala. 299, 10 South. 139; Pray v. Omaha St. Ry., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717; Blake v. Burlington, C. R. & N. Ry. Co., 89 Iowa, 8, 56 N. W. 405, 21 L. R. A. 559; B. & O. Ry. v. State, 72 Md. 36, 18 Atl. 1107, 6 L. R. A. 706, 20 Am. St. Rep. 454; Cody v. N. Y. & N. E. R. R. Co., 151 Mass. 462, 24 N. E. 402, 7 L. R. A. 843; Wagner v. Mo. Pac. Ry. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; Berry v. Mo. Pac. Ry. Co., 124 Mo. 223, 25 S. W. 229; N. Y., L. E. & W. Ry. Co. v. Ball, 53 N. J. Law, 283, 21 Atl. 1052; Washburn v. Nashville, etc., R. R. Co., 40 Tenn. 638, 75 Am. Dec. 784, International & G. N. Ry. v. Ormond, 64 Tex. 485.



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We think the court erred in taking this case from the jury. A number of witnesses testified that the train was so crowded when the plaintiff went upon the train that no seats could be obtained, and some testified that it was even difficult to get to the door of the car. Upon the other side, evidence was submitted to the effect that there were several vacant seats in one of the passenger cars, and that there was no difficulty in getting into the passenger coaches. This was a material question in the case. It was also a material question whether the carrier had posted notice of its rules and regulations relating to passengers occupying the baggage car. We think, in view of the fact that the compartment occupied by the plaintiff was in the rear of the train, and he was sitting upon a box in an unexposed part of the car, that there is a debatable question as to whether the position he occupied was any more hazardous than a seat in the passenger coach, if there was such a car in the train. These questions were questions of fact, upon which reasonable minds might fairly come to different conclusions.

The judgment of the district court is reversed, and a new trial ordered, at the costs of the defendant in error. All the Justices concur, except BURWELL, J., who tried the case below, not sitting, and IRWIN and PANCOAST, JJ., absent.

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(Circuit Court of Appeals, Sixth Circuit, July 17, 1907.)

[155 Fed. Rep. 81.]

**Carriers—Circus Train—Transportation—Contract—Public Policy.\***

—A circus company, owning its own cars, contracted with a railroad company for the hire of motive power and the use of tracks and trainmen, to be considered as the circus company's servants, for the transportation of the train from one place to another; the contract exempting the railroad company from liability for injuries to any person or persons using the train from whatsoever cause. Held that, the railroad company being under no legal duty to move the circus company in the manner specified, the contract was not contrary to public policy.

**Same—Injuries to Employee—Carrier and Passenger—Relation.†—**

Where a carrier leased motive power, the use of its tracks, and train

\*See generally, foot-notes appended to *Baker v. Boston & M. R. Co.* (N. H.), 23 R. R. R. 592, 46 Am. & Eng. R. Cas., N. S., 592; foot-notes appended to *Feldschneider v. Chicago, etc., Ry. Co.* (Wis.), 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737; *Weaver v. Ann Arbor R. Co.* (Mich.), 16 R. R. R. 603, 39 Am. & Eng. R. Cas., N. S., 603.

†For the authorities in this series on the question whether the employees of others, while being transported by a railroad company, are the passengers of the latter, see *Denver & R. G. R. Co. v. Whan* (Colo.), 23 R. R. R. 70, 46 Am. & Eng. R. Cas., N. S., 70 (conductor in

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operatives to a circus company, under a contract exempting the carrier from liability for all injuries, the relation of passenger and carrier did not exist between the railroad company and an employee of the circus company, traveling solely by virtue of his employment, who was not a party to such transportation contract, so as to entitle such employee to recover against the railroad company for injuries sustained in a collision between two sections of the circus train.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Action for injury to an employee of a traveling circus company while riding in a train of cars belonging to his employer, drawn, under a special contract, over defendant's road. The circus company owned as a part of its equipment the cars necessary for the transportation of its animals, property, and employees from place to place, and through its own servants loaded and unloaded these cars to suit its own convenience. For the hauling of these cars upon a schedule arranged to suit its business, it contracted with the defendant company for motive power and servants to operate same and trainmen to operate the train.

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charge of sleeping car hauled by railroad is not a passenger); *Baker v. Boston & M. R. Co.* (N. H.), 23 R. R. R. 592, 46 Am. & Eng. R. Cas., N. S., 599 (shipper's employees); *Riley v. Chicago, R. & Q. Ry. Co.* (Neb.), 23 R. R. R. 441, 46 Am. & Eng. R. Cas., N. S., 441 (person accompanying shipment of live stock not a passenger within meaning of section 10,039, Cobbey's Ann. St. 1903); *Malott v. Central Trust Co.* (Ind.), 22 R. R. R. 189, 45 Am. & Eng. R. Cas., N. S., 189 (mail clerks); *Bradburn v. Whatcom County Ry. & Light Co.* (Wash.), 22 R. R. R. 782, 45 Am. & Eng. R. Cas., N. S., 782 (police officer carried free in compliance with unconstitutional ordinance); *Sprigg's Adm'r v. Rutland R. Co.* (Vt.), 17 R. R. R. 628, 40 Am. & Eng. R. Cas., N. S., 628 (caretaker accompanying cattle); *Weaver v. Ann Arbor R. Co.* (Mich.), 16 R. R. R. 603, 39 Am. & Eng. R. Cas., N. S., 603 (person traveling on drover's pass); foot-notes appended to *Long v. Lehigh Valley R. Co.* (C. C. A.), 12 R. R. R. 508, 35 Am. & Eng. R. Cas., N. S., 508 (express messengers); *Southern Pac. Co. v. Cavin* (C. C. A.), 20 R. R. R. 803, 43 Am. & Eng. R. Cas., N. S., 803 (mail clerks); *Chicago, B. & Q. R. Co. v. Troyee* (Neb.), 19 R. R. R. 350, 42 Am. & Eng. R. Cas., N. S., 350; (traveling on drover's pass); *Illinois Cent. R. Co. v. Porter* (Tenn.), 20 R. R. R. 686, 43 Am. & Eng. R. Cas., N. S., 686 (railway postal clerks); *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672 (shipper's employee accompanying live stock, application of statute relieving railroad from liability for injuries to any person not a passenger); *Holmes v. Birmingham So. R. Co.* (Ala.), 14 R. R. R. 815, 37 Am. & Eng. R. Cas., N. S., 815 (shipper's employee a passenger, so as not to be fellow servant of engineer of the train); *Central Pac. R. Co. v. United States* (U. S.), 6 Am. & Eng. R. Cas., N. S., 777 (transportation of post office inspectors); *Foreman v. Pennsylvania R. Co.* (Pa.), 17 Am. & Eng. R. Cas., N. S., 246 (railway mail clerk not a passenger within meaning of Pennsylvania statute); *Louisville, etc., R. Co. v. Kingman* (Ky.), 5 Am. & Eng. R. Cas., N. S., 401 (postal clerk); *Martin v. Philadelphia & R. R. Co.* (Pa.), 23 Am. & Eng. R. Cas., N. S., 170 (mail agent); note, 20 Am. & Eng. R. Cas., N. S., 121 (circus employee on defective car controlled by the master; express messengers; mail clerks); note, 5 Am. & Eng. R. Cas., N. S., 405 (mail agents).

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These cars were 36 in number, and were divided into two sections of same train. Plaintiff, while sleeping in one of the sleeping coaches provided by his employer for the use of his employees exclusively, was hurt by a rear-end collision between the two sections of the circus train. Whether this collision was a blameless accident, or was due to some defect in the brakes on the cars owned by the circus company, or some defect in one of the engines owned by the defendant company, or was due to some negligence of one or other of the servants engaged in the operation of the train itself, does not appear, and no effort was made by either side to explain. The plaintiff said below, and here repeats, that he was a passenger, and that proof of an accident and injury makes a prima facie case for him. The defendant denies that relation and relies upon the special terms of the arrangement under which it was hauling this special circus train. That special contract, among other things, provided that the railroad company should hire the motive power and men to operate same and the right to use the tracks, to an extent necessary to haul said cars, and that it should furnish train conductors, brakemen, engineers, and firemen, but that the same should, while engaged in the operation of the circus company's train, be held to be the "servants" of the circus company, "and to be operating said motive power, cars, and trains under the order, direction, and control" of the circus company. To enable the defendant to operate its own trains without interference by the circus train and for the safety of all concerned, it was further provided that there operations should be subject also to the rules and regulations and orders of the defendant's train dispatcher. In consideration of the special character of this contract, and the reduced rates given, it was stipulated that the railroad company should not be liable to the circus company, or to "any person or persons whomsoever using said train or carried under this contract for any loss, injury or damage that may happen \* \* \* no matter how the same may be caused, all risk whatsoever being taken and assumed by the" circus company, called the contractors. By another clause the circus company agrees to assume all risk of loss or damage, no matter how caused, "which may be sustained by any person, animal, or property of any kind while being carried" and to "indemnify, protect and save harmless" the said railroad company from any loss, damage, or expense which it may bear or suffer arising out of any claim by any person on account of injury, or loss of property. Upon the conclusion of all the evidence, the court below instructed a verdict for the defendant in error.

*John H. Brogan and Charles Hatch*, for plaintiff in error.  
*Harrison Geer*, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

If the contract under which the Wallace Circus was being transported over the railway of the defendant was a valid con-

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tract, the relation of the railway company to the circus company was not that of a common carrier at all. That the railway company was under no common-law obligation to move the circus company over its line in the manner it was being transported at the time of the injury to the plaintiff in error must be conceded. If the railway company was under no statutory or common-law obligation to render the special service it was called upon to render there were no reasons of public policy which forbade the rendition of such service upon such terms as the parties might stipulate. The right to make special stipulation under such conditions has been recognized and applied in a number of cases substantially like the case at bar when circus trains were hauled under special agreements relieving the company from carrier's liability. *Coup v. Wabash, etc., Ry. Co.*, 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; *Forepaugh v. Delaware, etc., Ry. Co.*, 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672; *Robertson v. Old Colony R. R. Co.*, 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482; *Chicago, etc., Ry. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161; *Wilson v. Atlantic, etc., R. R. Co. (C. C.)* 129 Fed. 774. The same freedom of contract in respect to the transportation of express matter and express messengers has been recognized repeatedly. *B. & O. Ry. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, and cases therein cited.

But it is urged with much force that Clough, the injured plaintiff in error, was not a party to the contract between the circus proprietors and the railway company, and therefore not affected by it. It has been said also that he neither agreed to relieve the railway company from liability for negligence while being carried upon the circus train nor bargained away by any agreement with the circus company his right to hold the railway company or the circus company liable for any negligence by which he might be injured while being transported as an employee of the latter. Upon these grounds it has been urged that the Voight Case has no application, because there the messenger had expressly assumed in his contract with the express company the risk of all injury he might sustain while in its service and to assume and ratify any agreement the express company had made or might make releasing any transportation company from liability to any of its employees. It is unnecessary to consider whether an express messenger's right of action to recover for carrier's negligence would depend upon any personal agreement made by him. In the Voight Case the messenger's release to the express company was a fact in the case, and as that inured to the benefit of the railway company it was unnecessary to go farther. See, also, *Long v. Lehigh Valley Co.*, 130 Fed. 870, 65 C. C. A. 354, where it was held that the messenger would be presumed to know and assent to any contract between the express company and the railway company under which he was to be transported.

In *Brewer v. N. Y., etc., R. Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647, it was held that the mes-

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senger was not affected by the contract between the express company and the railway company by which he was made to assume the hazard of his carriage; he having no knowledge of the contract.

The express messenger cases are all distinguishable from the case at bar in the character of the service which the railway company undertook to render. In the express company case the car in which the express matter was carried and the messenger traveled was furnished by the railway company, and the car itself was part of a train under the exclusive control of the carrier. Under the contract here involved, the trains were made of cars furnished and loaded by the circus company. These trains were pulled by engines which were the general property of the railway company, but the special property of the circus company under a contract of hiring. The trains were to be hauled over the tracks of the defendant in error, but only upon a special contract for the use of the tracks to the extent necessary. The engine and the train were under the control of servants of the railway company, but under a contract by which they became for the purpose of moving this train the special servants acting under orders and directions and in behalf of the circus company.

Neither was such a contract one which disabled the railway company from discharging its general duties as a common carrier. The arrangement fell far short of that sort of transfer of corporate property which is involved in the leasing of one railway to another or to a stranger. In the absence of statutory power, a leasing which disables the lessor from the continued exercise of its corporate duties is *ultra vires*. *Arrowsmith v. Nashville, etc., R. Co.* (C. C.) 57 Fed. 165, and cases there cited. The stipulation between the railway company and the circus company involved only the temporary use of the company's tracks for the single purpose of passing its train over the rails from one point to another and the use of a limited amount of its motive power to haul these trains. This did not disable the company from the usual exercise of its corporate power. We see no illegality in a railway company permitting a use of its tracks by another which does not substantially disable it from the usual and ordinary performance of its corporate duties to the public. 2 Elliott on Railroads, § 451; *Union Pac. R. Co. v. Chicago, etc., Ry. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265. Neither does the fact that the enginemen and trainmen were operating this train at the time of this collision affect the question of liability to this plaintiff. They were the general servants of the defendant in error, but on this occasion they were the special servants of those who hired them. For the time the railway company had parted with its control and direction of these servants and was not responsible for their acts to either the circus company or those in its service whose only right upon this train was by virtue of their relation to the circus company. *Byrne v. Railway Co.*, 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; *Hardy v. Shedden Co.*, 78 Fed. 610, 24 C. C. A. 261,

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37 L. R. A. 33. This train under this contract was at the time being run or operated by the special servants of the circus company, and their acts were the acts of that contractor, and not the acts of the railway company.

The plaintiff paid no fare, and his only right upon the train was by virtue of the contract and arrangement which his employers had with the railway company. By the terms of that agreement his employers assumed all risks of transportation and undertook themselves as hirers of motive power to move their own train under trackage rights acquired under same contract.

As the relation of passenger and carrier did not exist between plaintiff and the railway company, an action for negligence based only upon that relationship cannot be maintained.

Judgment affirmed.

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**PATERSON v. PHILADELPHIA RAPID TRANSIT CO.**

(Supreme Court of Pennsylvania, May 20, 1907.)

[67 Atl. Rep. 616.]

**Carriers—Injury to Passenger—Presumption of Negligence.**—Where a man in a crowded car gives a woman his place, and stands on the front platform and is injured, he forfeits the advantage of the presumption that the accident resulted from the negligence of the company.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Dugald S. Paterson against the Philadelphia Rapid Transit Company. Judgment for defendant. Plaintiff appeals. Affirmed.

At the trial Audenreid, J., in the court below, in giving binding instructions for defendant, described the accident as follows:

"The plaintiff was a passenger in one of the defendant's cars. He was riding inside of it. It is true that he had no seat, but he was standing inside of the body of the car in a position of safety. When the car reached a certain crossing, two ladies, and, as I recall the testimony, a gentleman, signified their intention to board it. The body of the car was already filled with passengers. The plaintiff knew that there was no more room inside of it. Nevertheless he alighted from the car to make way for the ladies. As might have been expected, one of them took the place he had vacated. There was no other place for her to take inside the car. When the plaintiff stepped on the car again, he was obliged to take a position on the platform or step. Here he was standing when the car passed a wagon which struck and injured him. He would not have been hurt if he had remained inside the car."

Before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.



**Venning v. Atlantic Coast Line R. Co***Louis Bregy and H. Homer Dalby, for appellant.**Thomas Leaming and Charles Biddle, for appellee.*

STEWART, J. When one chooses to ride upon the platform of a car rather than wait for a car in which he can be accommodated, if not with a seat, with standing room at least inside, and is injured in consequence, the law does not concern itself to inquire as to the considerations which influenced his choice. Whether serious or trivial, the result is the same. The platform is a known place of danger, and one voluntarily there assumes the risk. For the exigency which determines him to take the risk rather than delay for another car, the company is not responsible. In this case the plaintiff, with a courtesy altogether commendable, surrendered his place within the car to a lady who, but for his action, would have been excluded. Having once yielded his place in the car, he was put to his choice whether to ride on the platform or take a later car, just as the person he accommodated would have been obliged to do had he not surrendered his advantage to her. The legal consequence of his choice was that he forfeited the advantage of the presumption, which the law raises in favor of one injured while riding in the car, that the accident resulted from the negligence of the company. His riding on the platform would not excuse negligence on the part of the company in exposing him to known and avoidable danger; but it put upon him the burden of showing that his injuries resulted from negligence of this degree. There was nothing in the evidence to support any such contention. From all that appears, it was an accident which even more than the care required under the circumstances to exculpate the defendant would not have avoided.

Judgment affirmed.

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**VENNING v. ATLANTIC COAST LINE R. CO.**

(Supreme Court of South Carolina, Aug. 31, 1907.)

[58 S. E. Rep. 983.]

**Commerce—Interstate Commerce—Connecting Carriers.\***—24 St. at Large, p. 1, makes each carrier the agent of its connecting carrier from whom it receives freight, and makes each liable for any freight lost, damaged, or destroyed by the connecting carrier. Held, an infringement of the interstate commerce clause of the federal Constitution.

**Constitutional Law—Equal Protection of Laws.†**—24 St. at Large, p. 1, making each carrier the agent of its connecting carrier from

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\*For the authorities in this series on the subject of state interference with interstate commerce, see foot-note appended to *Harrill Bros. v. Southern Ry. (N. Car.)*, 23 R. R. R. 427, 46 Am. & Eng. R. Cas., N. S., 427.

†See foot-notes appended to *Lexington Grocery Co. v. Southern Ry. Co. (N. Car.)*, 14 R. R. R. 349, 37 Am. & Eng. R. Cas., N. S., 349.

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whom it receives freight, and liable for neglect of its connecting carrier, is not a violation of Const. U. S. Amend. 14, or Const. S. C. art. 1, § 5, as denying to the carrier the equal protection of the law.

**Carriers—Loss or Damage to Freight.**—24 St. at Large, p. 81, providing a penalty for failure to pay loss or damage to freight in a given time, applies only to loss or damage to freight occurring on line of carrier sued in the state.

**Same—Information as to Loss.**—24 St. at Large, p. 81, § 2, providing for the recovery of loss or damage to freight, does not impose on one connecting carrier liability for the default of another, unless such carrier obtains and gives information, or uses due diligence, as provided by Civ. Code 1902, § 1710, by furnishing information as to when the loss or damage occurred.

Appeal from Common Pleas Circuit Court of Clarendon County.

Action by S. R. Venning against the Atlantic Coast Line Railroad Company. From circuit judgment affirming judgment of the magistrate, defendant appeals. Reversed.

The following are the statutes referred to and considered in the opinion:

Civ. Code, 1902, § 1710:

"When under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order,' and if such freight or express has been lost, damaged or destroyed, it shall be the duty of the initial, delivering or terminal road, upon notice of such loss, damage, or destruction being given to it by the shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days after such notice, or to trace such freight and inform the said party so notifying when, where and by which carrier the said freight or express was lost, damaged or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage or destruction in the same manner and to the same extent as if such loss, damage or destruction occurred on its lines: Provided, that if such initial, terminal or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage or destruction occurred, it shall thereupon be excused from liability under this section."

24 St. at Large, p. 1:

"An act to further define connecting lines of common carriers and to fix their liabilities.

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, that all common carriers over whose transportation lines, or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers on a contract for through carriage, recognized, acquiesced in or acted upon by such carriers,

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shall in this State, with respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the courts of this state, any through bill of lading, way bill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute *prima facie* evidence of the subsistence of the relations, duties and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers, or either of them.

"Sec. 2. For any damages for injury, or damage to, or loss, or delay of any freight, baggage or other property sustained anywhere in such through transportation over connecting lines, or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this state therefor, shall be held liable to such person or persons, and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the losses, damage or injury sustained, together with costs of suit.

"Sec. 3. That this act shall take effect immediately upon its approval by the Governor, and all acts and parts of acts inconsistent with this act are hereby repealed.

"Approved the 13th day of May, A. D. 1903."

24 St. at Large, p. 81:

"An act to regulate the manner in which common carriers doing business in this state shall adjust freight charges and claims for loss or damage to freight.

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, that from and after the passage of this act, all common carriers doing business in this State shall settle their freight charges according to the rate stipulated in the bill of lading: Provided, the rate therein stipulated be in conformity with the classification and rates made and filed with the Interstate Commerce Commission, in case of shipments from without this state, and with those of the railroad commissioners of this state, in case of shipments wholly within this state; by which classification and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carrier to inform any consignee or consignees of the correct amount due for freight, according to such classifica-

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tions and rates; and upon payment and tender of the amount due on any shipment, or on any part of any shipment, which has arrived at its destination, according to such classifications and rates, such common carrier shall deliver the freight in question to the consignee or consignees, and any failure or refusal to comply with the provisions hereof shall subject each such carrier so failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee or consignees aggrieved by suit in any court of competent jurisdiction.

“Sec. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days in case of shipments from without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: Provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: Provided, further, that no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, vol. 1, of the Code of Laws of South Carolina, 1902.

“Sec. 3. That any common carrier, upon complying with the provisions of this act, shall have all the rights and remedies herein provided for against the common carrier from which it received the freight in question.

“Sec. 4. That causes of action for the recovery of the possession of the property shipped, for loss or damage thereto and for the penalties herein provided for, may be united in the same complaint.

“Sec. 5. That all acts or parts of acts inconsistent with this act be, and the same are hereby, repealed.

“Approved the 23d day of February, A. D. 1903.”

*P. A. Willcox, Henry E. Davis, and Wilson & Du Rant, for appellant.*

*W. C. Davis, for respondent.*

WOODS, J. The Belknap Hardware Company, in January, 1905, delivered to the Southern Railway Company at Louisville, Ky.,

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a steel range and warming closet, consigned to the plaintiff at Manning, S. C. The defendant, Atlantic Coast Line Railroad Company, the terminal carrier, delivered to the plaintiff the warming closet only, and this action was brought in a magistrate's court to recover \$21 for failure to deliver the range and \$50, the statutory penalty for failing to adjust and pay the claim within 90 days. The allegation of the complaint is that the Southern Railway Company undertook carriage and delivery of the goods to Manning, S. C., for itself and the defendant, its connecting line. But the bill of lading expressly provides: "No carrier shall be liable for loss or damage not occurring on its portion of the route." The defendant's clerk, whose duty it was to check the contents of cars turned over by the Southern Railway to the Atlantic Coast Line Railroad at Columbia, testified the range was marked short on his book and was never received by the Atlantic Coast Line Railroad. The magistrate rendered judgment in favor of the plaintiff for \$21 for failing to adjust and pay the claim in 90 days, and on appeal the circuit court affirmed the judgment.

1. It was held in *Willett v. Railway Co.*, 66 S. C. 477, 45 S. E. 93, that when property received by the initial carrier in good condition is delivered by the terminal carrier in damaged condition, the burden is on the terminal carrier to show the damage did not occur on its own line. The same principle was held to apply to the loss of a part of a car load of goods in *Walker v. Railway Co.*, 76 S. C. 308, 56 S. E. 952, and in *Bradley v. Railway Co.* (recently filed) 57 S. E. 1101, it was held to extend to the loss of a part of several articles shipped under one bill of lading. Applying this last case, the defendant's delivery of the warming closet cast upon it the burden of showing that it had never received the range. The credibility of the testimony that the range had not come into the possession of the defendant was for the magistrate and the circuit court to pass on, and, had the record disclosed that this evidence was disbelieved on any reasonable ground, the judgment would be affirmed, because this court could not disturb a finding of fact that the presumption of loss by the terminal carrier had not been refuted by credible testimony. The record makes it clear, however, the judgment was not upon this ground, but on the statute of 1903 (24 St. at Large, p. 1), under which the defendant as one of the connecting carriers would be liable without respect to whether the range was lost on its line or on that of another carrier. If the act of 1903 is a valid statute, the evidence that the range was never delivered to the defendant carrier would be immaterial, and it was no doubt so regarded by the circuit court. The vital question therefore is whether this act of May, 1903, must be held unconstitutional as an attempt to regulate interstate commerce. In *Skipper v. S. A. L. Ry. Co.*, 75 S. C. 276, 55 S. E. 454, 7 L. R. A. (N. S.) 388, an exception raising the question of the constitutionality of this act was overruled, but the main question considered in that case was the constitutionality of sections 1710 and 2176 of

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the Civil Code of 1902. We propose now to consider the question of constitutionality of the act of May, 1903, as if it had not been heretofore made.

2. The statute was intended to make radical changes in the law as to the liability of carriers for losses or damage occurring on connecting lines. The extent of the changes contemplated will be made evident by viewing the state of the law as it appears from the adjudications of the Supreme Court of the United States and the Supreme Court of this state, with respect to the relations of connecting lines with each other, and to the owners of goods in course of transportation, and with respect to the right of such carriers to contract, before the enactment of the statute, in contrast with the law as it would be under the statute. The Supreme Court of the United States held, in *Michigan Central R. R. Co. v. Mineral S. M. Co.*, 83 U. S. 318, 21 L. Ed. 297, that, in the absence of a contract to the contrary, the liability of a common carrier ended with its prompt delivery of the property in good order to the next connecting carrier. This rule was recognized and followed by the same court in *Railroad Co. v. Pratt*, 89 U. S. 129, 22 L. Ed. 827, and *St. Louis Ins. Co. v. S. L. R. R. Co.*, 104 U. S. 146, 26 L. Ed. 679, and other cases. The law was held to be the same in this state in *Piedmont, etc., R. R. Co. v. C. & G. R. R. Co.*, 19 S. C. 353; *Dunbar v. Railway Co.*, 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860; *Hill v. Railroad Co.*, 43 S. C. 461, 21 S. E. 337. Under these cases it is obvious a stipulation in the bill of lading, limiting the liability of each carrier to its own line, would be a reasonable limitation. In *Lewis v. Railroad Co.*, 25 S. C. 249, it was held the initial carrier could not without special authority make a contract binding upon the terminal carrier. Terminal and intermediate carriers were held entitled to the benefit of any reasonable stipulations in the bill of lading limiting their liability, in *Harby v. So. Ry. Co.*, 75 S. C. 321, 55 S. E. 760.

The act of 1882 (Civ. Code 1902, § 2176) provided the initial carrier should be liable for loss or damage to goods until it discharged itself by showing a written receipt from the carrier to which it was its duty to deliver it; and, when the initial carrier so discharged itself, the successive connecting carriers were made liable in the like manner, with the right to discharge themselves by like written receipt from the next carrier. The act further provided that any carrier by willfully failing or refusing to produce the written receipt of the next carrier, on the demand of any one interested, lost the benefit of it in any action brought against the carrier for the loss or damage of the property. This act was held constitutional in *Skipper v. S. A. L. Ry.*, 75 S. C. 276, 55 S. E. 454, 7 L. R. A. (N. S.) 388, and there is no ground to doubt the soundness of that conclusion. The act did nothing more than relieve persons interested in property lost or damaged in transit of intolerable hardship, by fixing the kind of evidence a carrier shown to have been in actual possession of the property should take, preserve, and produce that it had been properly delivered to an-



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other carrier. It merely made a rule of evidence less drastic than that which was held to be reasonable and valid in *Richmond, etc., Co. v. Patterson Tobacco Co.*, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759. The section of the Virginia Code under consideration in that case was: "When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of its own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing, \* \* \* if such thing be lost or injured, such common carrier shall himself be liable therefore, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge." In holding the statute to be the legitimate exercise by the state of Virginia of the power to determine the form in which contracts may be proved, not amounting to a regulation of interstate commerce, the court says, at page 314 of 169 U. S., page 336 of 18 Sup. Ct. (42 L. Ed. 759): "The inadequacy of the bill of lading to protect the carrier from liability beyond its own line resulted, it is true, from the statute, but not because the statute forbade the carrier from contracting so as to limit his liability, but because the contract which he did make was not in the form required by law, and therefore was not evidence that there was such a contract. Indeed, the entire argument, upon which it is asserted that error was committed by the court below, but manifests in varying forms of statement the fallacy already noticed, that is, it comes from obscuring the difference between substance and form, between a power to contract and the asserted right in availing of the authority, to disregard the requisites essential to show a valid contract, and this confusion also marks the difference between the case now presented and the very many adjudged cases cited by the plaintiff in error in support of its proposition."

The act of May, 1903, now under consideration, is entirely different in scope from the Virginia statute and our statute of 1882. It goes far beyond prescribing a rule of evidence or the form of contract. By it the General Assembly has undertaken to make a complete change in the legal relations of connecting carriers to each other and to the owners of goods in transit, and in the right of such carriers to contract. The act provides that all carriers which recognize, acquiesce in, or act upon a contract for through shipment shall be statutory connecting carriers, and, as such, agents of each other with respect to the matter of transportation, and they shall be under contract each with all the others, and with the shipper, owner, and consignee, for safe and speedy transportation of the property from the point of shipment to destination. Any through bill of lading, issued by any one of such carriers, showing that any one of them received the property for through transportation, is made prima facie evidence of the agency of each other and all the others, and of the contract of each and all of such carriers with each other and with the owner to transport the

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property with safety and speed from the point of shipment to destination; and against this prima facie evidence of agency and contract the express stipulations of the parties themselves are made unavailing. In consonance with these provisions, it is further enacted, the person sustaining damage or loss shall have the right of recovery against any one of the connecting carriers he may choose to sue; the liability being unaffected by proof that the property had been lost or damaged on another line, or had never come into the possession of the carrier sued. The carrier singled out by the shipper, owner, or consignee is in turn allowed to recover from the carrier through whose negligence the loss, damage, or injury was sustained, together with costs.

In *Central Ry. Co. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444, the Supreme Court of the United States held a statute of Georgia unconstitutional as to interstate commerce, which imposed upon the initial or any connecting carrier, as a condition of availing itself of a valid contract of exemption from liability beyond its own line, the duty of tracing the freight and informing the shipper in writing, when, where, and how, and by which carrier, the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established. In *Skipper v. Railroad Co.*, *supra*, this court held section 1710 of Civil Code constitutional. Pointing out the particulars in which that section differed from the Georgia statute, which had been declared unconstitutional in *Central Ry. Co. v. Murphey*, *supra*, Mr. Justice Jones uses this language: "The Georgia statute made the initial carrier absolutely liable if it failed within 30 days after application to inform the shipper in writing when, where, how, and by what carrier the freight was lost or damaged, together with the names of witnesses to establish such facts; whereas, our statute (section 1710) provides that the carrier shall be excused from liability upon proof that, by the exercise of due diligence, it has been unable to trace the line upon which the loss or damage occurred. The Georgia statute prevented a carrier from availing itself of a valid contract exempting from liability for loss or damage occurring beyond its own line, except upon an onerous condition, which in many cases it could not meet; whereas, the South Carolina statute excuses the carrier if the loss did not occur on its own line, and it could not after due diligence comply with the statute." The act of 1903, now under consideration, goes as far beyond the Georgia statute as section 1710 fell behind it. The Georgia statute was held to be unconstitutional, in that it made one connecting carrier liable for the delict of another, unless it exempted itself by giving to the party interested information within 30 days as to the particulars of the loss. The requirement that the carrier should obtain and give this information was, as the court held, so onerous as to amount to an illegal attempt to regulate interstate commerce. Still, under the Georgia statute, the carrier had the chance to save itself by giving the

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information required. In our statute there is no means of escape for a carrier which recognizes, acquiesces in, or acts upon the contract of the initial carrier for through shipment, however innocent from liability for the breach of duty of a connecting carrier.

The far-reaching character of the attempt to regulate interstate commerce will be still more apparent on viewing another feature of the statute. The provision that the carrier selected for liability by the owner of the goods should have the right of recovery from the carrier actually in default, to compensate for its own liability to the owner, would be of no avail against the real defaulting carrier operating entirely outside the state. For the state law can have no extraterritorial effect. A railroad operating in Kentucky cannot be made the agent of a railroad in South Carolina, or liable for its default, or subject to a suit by the South Carolina railroad for breach of duty to a shipper, by authority of a South Carolina statute. Therefore, if this statute is given effect, a carrier operating on an interstate line partly in this state, upon receiving freight in Georgia upon a connecting line, under a bill of lading issued by a Kentucky railroad, would have to pay for the loss or damage arising from the negligence of the Kentucky road, without any recourse against the defaulting road. Obviously, the practical result would be that the loss and damage on all through shipments from the entire country into South Carolina would fall on the interstate roads coming into this state, to the exemption of all connecting roads for their own defaults. On principle, as well as under the authority of *Central R. R. Co. v. Murphey*, it is impossible to avoid the conclusion that the act of May, 1903, here under consideration, is unconstitutional.

The defendant submits that the act is obnoxious to the fourteenth amendment of the Constitution of the United States and section 5, art. 1, of the Constitution of South Carolina, in that it denies to common carriers the equal protection of the law, and should be declared void even as to the transportation of goods by connecting lines entirely within the state. The argument in support of this proposition is strong, but we do not think it is conclusive. While the lawmaking branch of the state government has no power to require persons or corporations to make contracts, it has in general the power to regulate the business of public transportation within its borders. Considered with respect to such business, in this act, the General Assembly has in effect forbidden a common carrier to recognize, acquiesce in, or act upon a through contract of shipment made by a shipper, owner, or consignee with another carrier, except upon condition that it shall become liable for any default of such other carrier. But the carrier may avoid this liability for the default of another by refusing to recognize, acquiesce in, or act upon the through contract of shipment. A carrier, it is true, is required by section 2177 of the Civil Code of 1902 to forward freight sent on another road "according to the directions contained thereon or accompanying the same," and we think, aside from this statute, the common law imposes the obligation upon the carrier to receive and forward goods tendered

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by another carrier, just as if they were tendered by the owner. But in doing so it need not recognize, acquiesce in, or act upon the through bill of lading. It may receive the goods, give its own receipt, charge its own freight, and in all respects repudiate or disregard the through bill of lading. By thus refusing to recognize, acquiesce in, or act upon the through bill of lading, it would avoid liability for the default of another. It cannot therefore be said that the statute denies to the carrier the right to prosecute its business, except upon condition that it shall become liable for the defaults of others.

3. It remains to consider whether the judgment of the circuit court in this case can be sustained under section 1710 of the Civil Code of 1902, or under the act of February, 1903 (24 St. at Large, p. 81). As to section 1710, it is only necessary to refer to the case of *Cave v. Railway Co.*, 53 S. C. 496, 31 S. E. 359, where it was held no relief could be given under this section unless the complaint alleged shipment under a contract providing that the responsibility of each carrier should cease upon the delivery of the freight to a connecting carrier "in good order." There is no allegation of the kind in this case. On the contrary, it is evident from the complaint the action was intended to rest on the invalidity, under the act of May, 1903 (24 St. at Large, p. 1), of such a contract as section 1710 contemplates. Section 1710 therefore can have no application.

We come, then, to the act of 1903 (24 St. at Large, p. 81), which it is convenient to designate as the act of February, 1903, to distinguish it from the statute already considered, and held unconstitutional, passed in May, 1903 (24 St. at Large, p. 1). We are not concerned with the first section, which relates to freight charges and the duty of the carrier to deliver goods on payment of the charges after they have reached destination. The section of main importance here is the second, which provides for the recovery for loss of or damage to freight, and penalties for failure to adjust and pay such loss or damage within a certain time. The question vital to this case is whether the statute can be construed to impose upon one connecting carrier liability for the default of another, unless such carrier obtains and gives the information, or uses due diligence to obtain it as provided in section 1710 of the Civil Code of 1902. We do not think it can be so construed. The main enactment as to the recovery of damages and penalties thus begins in section 2: "That every claim for loss of, or damage to property *while in the possession of such common carrier* shall be adjusted and paid within forty days," etc. The words we have italicized clearly limit the loss and damage which a carrier is required to adjust and pay for, to that which befalls while the goods are in the possession of such carrier, and excludes the idea of liability for loss or damage to the goods while in the possession of another carrier. It is true there is a proviso at the end of this section "that no common carrier shall be liable under this act for property which never came into its possession," if it complies with the provisions of section 1710, vol. 1, of the Code of Laws

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of South Carolina of 1902. But as the body of the act does not make the carrier liable at all "for goods which never came into its possession," a proviso which exempts from liability for loss of or damage to such goods on certain conditions can have no effect. The act imposes no liability to which the exemption can be applied.

4. The rule is that all parts of a statute, including provisos, are to be construed together, and effect given if possible to all. But it is contrary to reason, as well as authority, to extend by implication a proviso to cover that which is opposed to the express language of the main enactment. *Southgate v. Goldthwaite*, 1 Bailey, 367; *U. S. v. Dickson*, 15 Pet. (U. S.) 141, 10 L. Ed. 689; *The Irresistible*, 7 Wheat. (U. S.) 551, 5 L. Ed. 520; 26 Am. & Eng. Enc. 681; Endlich on Statutes, §§ 184, 185. The fact that the statute is penal adds force to this conclusion. We are of the opinion that the proviso of section 2 has no effect, and the act only imposes penalties upon the carrier for failing to adjust claims for loss, occurring while the goods are in its own possession. It follows, the plaintiff in this case cannot sustain his recovery on the ground that the defendant was liable under the act of February, 1903, for goods lost by a connecting carrier because it failed to obtain and give information of the kind required in cases falling under that act, or to use due diligence to obtain such information.

5. This penalty act of February will apply to the case if the finding on the new trial should be that the loss occurred on the defendant's road, but not otherwise. It is attacked as unconstitutional under the interstate commerce clause of the Constitution of the United States. That question is discussed and decided against the defendant's contention in *Charles v. A. C. L. R. R. Co.* (recently filed) 58 S. E. 927.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to the magistrate's court for a new trial.

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**VALENTE *et al.* v. SIERRA RY. CO. OF CALIFORNIA.**

(Supreme Court of California, July 22, 1907.)

[91 Pac. Rep. 481.]

**Carriers — Death of Passenger — Collision — Negligence — Instructions.**—In an action for death of a passenger on a railroad train by a collision, an instruction that the burden of showing that the collision occurred by no fault of defendant, and from some inevitable casualty or unavoidable accident or cause beyond the power of human care or foresight to prevent, was on the defendant, merely required the carrier to comply with Civ. Code, § 2100, providing that carriers shall use the utmost care and diligence for the safe carriage of passengers, and was not objectionable as requiring too high a degree of care.

**Same—Burden of Proof.**—In an action against a carrier for death of a passenger in a collision, the court charged that the burden was on the carrier to show that the collision occurred without its fault,



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and from inevitable casualty or unavoidable accident, etc., and that it must establish by a preponderance of the evidence that the collision resulted from such unavoidable accident, etc. Held erroneous, as relieving plaintiffs from the burden of establishing their allegation of negligence in the first instance, the court having nowhere instructed that the burden was on plaintiffs to establish the truth of their allegation of negligence by a preponderance of the evidence.

**Evidence—Judicial Notice—Expectancy Tables.\***—Courts take judicial notice of the standard mortality tables.

**Same—Authenticity—Proof—Discretion.†**—The admission of mortality tables without preliminary proof of authenticity and reliability is within the discretion of the court.

**Death—Expectancy of Beneficiaries—Evidence.‡**—In an action for death, it was not error for the court to admit evidence of the life expectancy of the beneficiaries as shown by a mortality table; the jury being instructed that no recovery could be had in any event for a period longer than the probable term of decedent's life.

**Carriers—Death of Passenger—Care Required—Instructions.‡**—In an action for the death of a passenger, an instruction that railroad companies engaged in transporting passengers for hire are bound to use the best precautions in practical use to secure the safety of passengers was objectionable; such carriers being only required to use the best precautions in "known" practical use.

Department 1. Appeal from Superior Court, Tuolumne County; L. W. Fulkerth, Judge.

Action by Frank Valente and others against the Sierra Railway Company of California. From a judgment in favor of plaintiffs, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

*J. C. Campbell, S. D. Woods, and F. W. Street, for appellant.*

*Nicol & Orr, F. P. Otis, and J. F. Rooney, for respondents.*

ANGELLOTTI, J. On June 25, 1904, a collision occurred on the railroad of defendant corporation, between a passenger train and a work train, in which Marie Valente, a passenger on the passenger train, was killed. This is an action by her surviving husband and children for the damages resulting to them from her death, due, it is claimed, to the negligence of defendant. The trial was

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\*For the authorities in this series on the subject of judicial notice of matters relating to railroads, etc., see foot-notes appended to *Southern Ry. Co. v. Blanford's Adm'x* (Va.), 21 R. R. R. 646, 44 Am. & Eng. R. Cas., N. S., 646.

†See foot-notes appended to *Pittsburgh, etc., Ry. Co. v. Ross* (Ind.), 23 R. R. R. 160, 46 Am. & Eng. R. Cas., N. S., 160.

‡For the authorities in this series on the subject of the degree of care required of a carrier of passengers with respect to its appliances and road, see foot-note appended to *Southern Pac. Co. v. Schuyler* (C. C. A.), 17 R. R. R. 674, 40 Am. & Eng. R. Cas., N. S., 674; foot-notes appended to *Western Maryland R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34.



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by jury, and a verdict for \$12,000 damages was given. The defendant appeals from the judgment entered thereon, and from an order denying its motion for a new trial.

The complaint alleged the happening of the collision and the death of Mrs. Valente resulting therefrom. These allegations were admitted by defendant in its answer. The complaint further alleged "that said collision was caused by and resulted from the carelessness and negligence of said defendant, and its servants and agents, in the management and operation of its said train, and the death of said Marie Valente was caused by and resulted from the said carelessness and negligence of said defendant, and its servants and agents, in the management and operation of its said train." These allegations were denied by the answer, which further alleged as follows: "On the contrary, said defendant alleges that said collision and the death of said Marie Valente therefrom was and were caused by and resulted from inevitable accident, without any fault or negligence on the part of the said defendant, or of its servants or agents, in any way whatsoever." Upon the trial evidence was introduced by the defendant to meet the prima facie case of negligence made by the showing of the accident. The collision occurred on a very heavy grade, the work train, consisting of an engine, and oil car about half filled with oil, and several flat cars, going down this grade and running into the rear of the passenger train. There was evidence tending to show that the work train was properly equipped, and in first-class order, and that the train hands carefully managed the same, and that the accident was due to the fact that the oil car had sprung a leak, allowing oil therefrom to drip upon the rails, with the result that the train could not be stopped. It is not intimated by plaintiff that the evidence would not have supported a conclusion by the jury that the defendant was free from negligence. Under these circumstances the trial court, after instructing the jury that, by reason of the admission as to the collision and the death of Mrs. Valente therefrom, a presumption arose that the accident resulted from defendant's negligence, and that, in order to rebut such presumption, defendant must show that the collision resulted from some inevitable casualty or unavoidable accident, or from some cause which human care and foresight could not have prevented, instructed the jury as follows: "The burden of showing that the collision occurred by no fault of the defendant and from some inevitable casualty or unavoidable accident or cause beyond the power of human care or foresight to prevent is on the defendant. *In order to absolve itself from liability from any loss which may appear from the evidence to have been occasioned by such collision, it must establish by a preponderance of the evidence that such collision was caused by or resulted from some inevitable casualty or unavoidable accident or cause beyond human care or foresight to prevent.*" The court nowhere instructed or intimated to the jury that, upon the whole case, the burden was upon the plaintiffs to establish the truth of their allegation of negligence by a preponderance of evidence.

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Complaint is made that these instructions charged defendant with a degree of care entirely unwarranted. This matter was very fully considered by this court in the recent case of *Kline v. Santa Barbara, etc., Ry. Co.*, 90 Pac. 125, and decided against the contention of defendant. It was shown in the opinion that, as to the particular matter under discussion, it was thoroughly established by our decisions that the language of such instructions was "the equivalent and no more than the equivalent of the rule" enacted in section 2100 of the Civil Code, requiring a carrier of passengers to use the "utmost care and diligence for their safe carriage," and was a correct statement of the rule of law applicable in such cases. The criticism that the words "beyond the power of human care or foresight to prevent" and "cause beyond human care or foresight to prevent" might be construed as meaning that, although the carrier had used the utmost care and diligence, he would still be liable if, after the accident, it appeared that it could have been avoided by a precaution which a very cautious person, not knowing that the accident was about to occur, would not have taken, was also made in that case. The court there, recognizing the true rule to be that the question as to whether the carrier has exercised the proper care and diligence is to be determined in view of the facts and circumstances which existed prior to the accident, declared, in reply to this objection: "It cannot be error, therefore, for a trial court, in submitting a case of this kind to the jury, to state the rule in its approved form, and, if counsel have reason to fear that the jury may understand the rule so expressed as requiring more than the utmost caution of very cautious persons, in view of the circumstances known or imputed to the knowledge of the carrier before the accident, they have the right to propose an instruction embodying the proper qualifications."

We can, however, find no valid answer to another objection made by defendant to the portion of these instructions that we have italicized. By it the jury was clearly instructed that the defendant must show by a preponderance of evidence that it was not negligent, or in other words, that it used the utmost care and diligence, in order to avoid a recovery of the damages resulting to plaintiffs from the death of Mrs. Valente. This also was the plain effect of all the instructions taken together. Such is not the law.

In any action for damages resulting from negligence, it is essential to the statement of a cause of action that negligence on the part of the defendant be alleged, and, if the allegation be denied, it must be proved by the plaintiff by a preponderance of the evidence. The affirmative of such an issue is primarily upon the plaintiff. This is elementary law, and, of course, it is not disputed by learned counsel for plaintiffs. Their contention in support of such instruction rests upon the well-settled doctrine, stated in *Shearman & Redfield on Negligence*, § 59, as follows: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course

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of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." In accord with this doctrine, it is the rule in this state that, when such an accident is shown by the plaintiff, or admitted by the pleadings, for there can be no difference in effect between the establishment of the fact by evidence on the trial and the admission of that fact by the pleadings, a prima facie case of negligence on the part of the defendant is made, which is sufficient to call upon the defendant to show the exercise of the requisite care, and thus offset the presumption of negligence arising from the happening of the accident. This presumption, however, is simply evidence in the case, having no greater or different effect than the evidence of witnesses showing negligence would have, and in no degree changes the rule as to the burden of proof, in the strict sense of that phrase, viz., the burden of producing a preponderance of evidence. That burden does not shift from side to side in the trial of a case, but constantly remains with the party having the affirmative of the issue, who, in an action for damages for negligence, is the plaintiff. Instructions declaring that, when such an accident is shown, the "burden of showing" want of negligence is on the defendant, do not mean, according to the decisions of this state, that the defendant is compelled to show want of negligence by a preponderance of evidence. The term "burden of showing" or "burden of proof," used in that connection, signifies simply the burden of meeting the prima facie case made by the plaintiff. This is the only theory upon which such instructions can be held to be free from error, unless we are to hold that the well-settled rule as to the burden of proof being on the party who has the affirmative of the issue has no application in the one case of an action for damages for negligence, where the damage results from an accident to a thing under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. It is eminently proper to hold that such a showing affords presumptive evidence of negligence, but it would be illogical and contrary to our well-established practice to hold that any kind of an evidentiary showing made by the party holding the affirmative of an issue in support of his claim, however strong such showing may be, throws upon the other party the burden of doing anything more than producing evidence enough to offset the effect of the plaintiff's showing. When a defendant has made such a showing as to the exercise of the care required of him by the law as to leave the evidence upon the issue of negligence in such condition that the jury cannot conclude that the negligence has been satisfactorily shown, he has met the requirements of the law, and the verdict must be against the plaintiff. The rule in this regard is no different in the case of a carrier of passengers from the rule applicable to defendants of whom a lesser degree of care is required. The only difference between these classes of defendants is as to the amount of care required; the carrier of passengers

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being guilty of negligence as to a passenger if he fails to use the "utmost care and diligence."

The rule, as stated by us, is fully recognized and established by our decisions. The case of *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871, was an action upon a contract, but, in view of an instruction to the jury to the effect that the defendant was required to have a preponderance of testimony upon a certain issue, owing to a presumption of evidence following a showing made by the plaintiff, which instruction was held erroneous, it is directly in point. It is pointed out in the opinion that the term "burden of proof" is used in different senses, sometimes being used to signify the burden of making or meeting a prima facie case, and sometimes the burden of producing a preponderance of evidence, and it was shown that, where it is used in the former sense, it means no more than that it is incumbent on the party against whom the prima facie case has been made to make such a showing that upon the whole case there is not a preponderance of evidence in favor of plaintiff's allegation of negligence. In *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340, 73 Pac. 164, a case where the accident, which was admitted, made a prima facie case of negligence, it was held that instructions to the effect that the burden to prove lack of care and to prove negligence is on the plaintiff throughout the case, and that plaintiff must show the same by a preponderance of evidence, were correct statements of the law, and not in conflict with the other instruction as to the effect of the admission as to the happening of the accident. It was said that the contention of the defendant was founded upon a failure to perceive the effect of the presumption as evidence. The court further said: "This presumption is itself evidence in the case, and it does not change the rule as to the burden of proof. It is merely the evidence by which the plaintiffs undertook to establish the fact which they were bound to prove. It still remained the law that, upon the whole evidence, the plaintiffs must have the preponderance in order to succeed." In *Cody v. Market St. Ry. Co.*, 148 Cal. 90, 84 Pac. 666, a passenger carrier case, it was held that an instruction to the effect that the presumption of negligence arising from proof of the accident and consequent injury threw upon the carrier the burden of showing want of negligence did not require the carrier to show want of negligence by a preponderance of evidence, but only to make such showing "as will leave the jury, with all the evidence before it, unsatisfied as to whether there was negligence on defendant's part." It was also there declared that, in such a case, it was necessary for the plaintiff to prove negligence by a preponderance of evidence. In *Patterson v. S. F. & M., etc., Co.*, 147 Cal. 178, 81 Pac. 531, also a passenger carrier case, the questions here involved were exhaustively discussed. It was held that instructions to the effect that, on the issue of negligence the plaintiff has the affirmative of the issue and must prove such negligence by a preponderance of evidence, and that any presumption arising from the accident need not be overcome by a preponderance of evidence,

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and that, if the railroad company introduce "sufficient evidence simply to balance such presumption without overcoming it by a preponderance of evidence, the presumption is overcome," were correct. See, also, *Kay v. Metropolitan, etc., Co.*, 163 N. Y. 447, 57 N. E. 751.

The cases cited by learned counsel for plaintiffs contain nothing opposed to the views we have stated, with the single exception of the case of *Bush v. Barnett*, 96 Cal. 202, 31 Pac. 2, a department case. Here the court upheld an instruction that the proof of plaintiff that she had been injured "would cast upon the defendant the burden of proving that the injury was occasioned by inevitable casualty, or by some other cause which human care and foresight could not prevent." This instruction, as we have seen, was correct, and did not throw upon defendant the necessity of proving want of negligence by a preponderance of evidence. The court in discussing it, however, said that the defense that the injury resulted from some unavoidable accident, or from some cause beyond the power of human care or foresight to prevent, was an affirmative one, which the rule as to the burden of proof requires him to establish by a preponderance of evidence, as in any other affirmative defense. This statement was erroneous, and in conflict with every decision of this court on the subject. Other cases cited are those where the defense was clearly and strictly an affirmative defense, and it was held simply that the burden is on the defendant to prove new matter alleged as an affirmative defense, which, of course, is the law. Here there was not and could not be any affirmative defense on the issue of negligence. Negligence on the part of defendant was alleged, as it had to be in order that a cause of action be stated. If plaintiff had alleged simply the collision and consequent death of Mrs. Valente, without any allegation of negligence, there would be no claim that the complaint was sufficient. Defendant simply denied the allegation of negligence. What it said in addition as to inevitable accident, etc., was merely supplemental to the denial and superfluous, and in no degree impaired the effect of the denial. It was not the statement of an affirmative defense. We cannot say as a matter of law that this instruction was not prejudicial to defendant. It follows that the judgment and order must be reversed on account thereof.

Several other points are made for a reversal, but they require very little notice for the purposes of a new trial.

The question as to the admission of a table of life expectancy without preliminary proof as to its authenticity and reliability appears to be decided against defendant's contention by the case of *Keast v. Santa Ysabel, etc., Co.*, 136 Cal. 256, 259, 68 Pac. 771, where it is held that the court may admit any table satisfactory to it, requiring or not requiring preliminary proof, depending upon whether of its own knowledge it is satisfied, or whether it desires evidence to satisfy itself, of the authenticity of the table. This ruling is, of course, founded upon the theory that the courts take judicial notice of the standard tables. 20 Am. & Eng. Ency. of Law (2d Ed.) p. 886. We can see no injurious effect in the ad-



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mission of evidence as to the life expectancy of the beneficiaries as shown by such a table, provided the jury is clearly instructed that it cannot, in any event, award damages to any one for any period extending beyond the probable term of the life of the deceased. As damages cannot be awarded any particular beneficiary for any period extending beyond such beneficiary's life, it is proper that such beneficiary should be allowed to show that his expectancy of life is as great as that of the deceased, just as the defendant, on the other hand, would be allowed to show that the life expectancy of the beneficiary is less than that of the deceased. See *Redfield v. Oakland, etc., Co.*, 110 Cal. 277, 287, 42 Pac. 822.

The instruction that "Railroad companies engaged in the transportation of passengers for reward are bound to use the best precautions, in practical use, to secure the safety of their passengers," is perhaps too broad a statement as an abstract proposition. The rule as stated in *Treadwell v. Whittier*, 80 Cal. 593, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, cited by plaintiffs, is that such companies are bound to use the best precautions in known practical use. This does not mean that such use must, in fact, have been known to a particular defendant, but simply that it must have been such that it would have been known to any company exercising the utmost care and diligence in keeping abreast with modern improvement in the matter of such precautions. We can conceive of cases where a precaution may have been in practical use to such a limited extent that it would not have become known as an improvement to those exercising the utmost care and diligence in this behalf, and in such cases the instruction would be erroneous. Under the evidence given upon the trial, this was not such a case, and the instruction was therefore not prejudicially erroneous. We have considered it necessary to point out the error therein solely for the purpose of a new trial, in view of the possibility that on such a new trial the matter may be material.

We find no other matter requiring discussion.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.



LOUISVILLE & N. R. CO. v. FISHER.

SCOTT v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Sixth Circuit, June 18, 1907.)

[155 Fed. Rep. 65.]

**Removal of Causes—Nonresidence of Both Parties—Consent.**—A Circuit Court acquires jurisdiction of a suit by removal, although neither of the parties is a resident of the district, and the suit could not originally have been brought in that court, where the plaintiff fails to object in any way to such removal, and submits to trial on the merits.

**Carriers—Carriage of Passengers—Performance of Contract.\***—A railroad company cannot be held answerable to a passenger in damages because of matters which are ordinary incidents of travel, such as exposure to drafts from windows opened by, or at request of, other passengers.

**Same—Accommodations During Transit.**—Plaintiffs purchased first-class tickets over defendant's railroad for passage between two points, and also tickets for a berth in a sleeping car between such points; such car being operated by another company and hauled under contract by defendant. At 3 o'clock in the morning, when some 45 miles from plaintiff's point of destination, owing to a wreck beyond such point, the sleeping car was diverted and sent around over another road to its point of destination, and plaintiffs were required to transfer into a day coach for the remainder of their journey, which was made in about two hours. The car so provided was comparatively new and in good condition, and the only material complaint in regard to it was that it was filled with passengers, and the windows were kept open; the month being August, although the night was somewhat chilly. Held, that such facts did not establish a breach of the contract of carriage which rendered defendant liable in damages.

**Same—Sleeping Car Company—Contracts for Accommodations.**—A sleeping car company which sells accommodations in its cars between points on a railroad to passengers of the railroad company, the cars being hauled by the railroad company in its trains under a contract between the two companies, is not liable to a passenger for breach of contract because the car in which such passenger is riding is diverted by the railroad company on account of a wreck and does not reach the passenger's point of destination, in consequence of which he is compelled to change into another car.

In error to the Circuit Court of the United States, for the Western District of Tennessee.

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\*As to a railroad company's duties, as a carrier of passengers, with respect to cars, see extensive note, 3 R. R. R. 154, 26 Am. & Eng. R. Cas., N. S., 154.

As to a carrier of passenger's duties during transportation, see extensive note, 4 R. R. R. 217, 27 Am. & Eng. R. Cas., N. S., 217.

## Louisville &amp; N. R. Co. v. Fisher

*John B. Keeble*, and *E. T. Scay*, for railroad company.

*K. D. McKellar*, for Fisher.

<sup>1</sup> *L. McRae*, for Pullman Co.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. Mrs. Anna M. Baldwin, an aged lady, and her daughter, Mrs. George Y. Scott, bought at Memphis, Tenn., from the Louisville & Nashville Railroad Company, tickets entitling them to first-class transportation from Memphis, Tenn., to Bowling Green, Ky., by a train leaving at 1 p. m. August 9, 1902, and due to arrive at Bowling Green about 5 o'clock a. m. They also bought from the agent of the Pullman Palace Car Company at Memphis one sleeping car ticket entitling them to the use of one sleeping berth as far as Bowling Green. The route of this sleeper was between Memphis and Cincinnati. About 3 o'clock a. m. of the following morning they were awakened by the Pullman conductor at or near Guthrie, Ky., and told that in consequence of a wreck north of Bowling Green the sleeper would be detoured at Guthrie and carried by way of Nortonville and over the Illinois Central Railway; thence into Louisville; and thence to Cincinnati over the Louisville & Nashville. They were also advised that they could by an ordinary coach go on to Bowling Green, which would enable them to reach their destination in about two hours. Plaintiffs were thereupon given seats in a day coach, and arrived at Bowling Green about on time. Upon the facts of the case, alleging a breach of contract, separate actions were brought by each against the railroad company and the Pullman Car Company. Pending the suit of Mrs. Baldwin, she died, and her action was revived by her administrator, and her declaration amended so as to charge that her death was due to her wrongful removal from the sleeper to the day coach. Both suits were submitted to the same jury, who found for Mrs. Baldwin's administrator for \$2,500 against the railroad company and for the railroad company against Mrs. Scott. In both cases there was an instruction to find for the Pullman Company. The railroad company has sued out a writ of error in the one case, and Mrs. Scott in the other, and the cases have been heard together upon the same transcript.

A question of jurisdiction of the court below was suggested by the court growing out of the fact that the plaintiffs were citizens of the state of Mississippi, the Louisville & Nashville Railroad Company, a corporation of the state of Kentucky, and the Pullman Palace Car Company, a corporation of the state of Illinois. The suits were brought in the circuit court of Shelby county, Tenn., and removed into the Circuit Court of the United States for the Western District of Tennessee upon the application of the two defendant corporations solely upon diversity of citizenship. Thus the suits were not brought within either the district of the plaintiff or that of the defendants, and, not being a suit which might have been originally brought in the court to

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which it was removed, was not properly removable to that court from the state court. *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150. But the defendant corporations might and did waive any objection which they might have made to being sued in a district of which neither they nor the plaintiff were inhabitants, by themselves removing the suits, and the plaintiff submitted to the jurisdiction thus invoked by failing to object in any way to such removal and by submitting to a trial upon the merits. This consent by both parties to the jurisdiction takes the case outside the authority of *Ex parte Wisner*, and brings it under *Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98, which is recognized in the former case as an authority when both parties have submitted to a suit in the district of neither; federal jurisdiction otherwise appearing. *Corwin Mfg. Co. v. Henrici Washer Co. (C. C.)* 151 Fed. 938.

The question of the liability of the railroad company is the same in each case, as the evidence was the same, and the ground of action identical. We consider the case of *Mrs. Baldwin* first. In Tennessee, the statute provides that:

"Whenever the facts in the case entitle the plaintiff to sue for breach of contract, or at his election for a wrong or injury, he may join the statement of his cause of action in both forms or either." *Shannon's Code Tenn.*, § 4439.

This is substantially what the defendant in error did, and while she states a contract, and sues for its breach, the gist of her action is the tort, the wrong and injury which arose out of the breach. The contract may in such cases be laid merely as the foundation of the duty which the defendant disregarded. *Poulin v. Canadian Pacific Ry. Co. (C. C.)* 47 Fed. 858. Two distinct contracts are stated in the declaration, one with the railroad company, and the other with the Pullman Company. In one count there is the semblance of a statement of a joint contract, but the facts stated make it plain that the contract with each was distinct. The contract with the railroad Company, as averred, is that it sold to the plaintiff "a full-rate ticket by which said railroad contracted to convey her in a first-class car all the way from Memphis to Bowling Green." The contract with the Pullman Company, as stated, is that she also bought a sleeping car ticket from its "agent at Memphis, paying full fare therefor, upon which ticket she was to receive sleeping car accommodations from Memphis to Bowling Green."

The court below instructed a verdict for the Pullman Company, and no writ of error has been sued out by *Mrs. Baldwin's* administrator against that company. We need not, therefore, consider its liability until we come to *Mrs. Scott's* writ of error to which it is a party. The only breach of the contract with the railroad company averred is in respect to the alleged failure of that company to carry her all the way to Bowling Green in a first-class car. That she was carried there is admitted, but it is averred she was removed from the sleeper in the nighttime and required to continue her journey in what is described as "an

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open car, in which were crowded men, women, and children, and in which all of the windows and doors were open. It is also said that:

"It seemed to have been an old car found somewhere along the company's line and for this supposed emergency, and was wholly different from the car in which the defendants had contracted to carry plaintiff to her destination."

It is then averred that the plaintiff was about 75 years of age, though she had enjoyed theretofore good health. That in consequence of exposure in this open car she contracted cold, and had been ill ever since. By the amended declaration it is charged that her death some 18 months afterwards was proximately caused by this "willful and wanton and unlawful conduct of the two defendants, in requiring her to change from a comfortable car in the manner stated to one where she was exposed as aforesaid and wholly unfit for the safety of herself." The evidence establishes that the train carrying the sleeper in which Mrs. Baldwin and Scott had secured sleeping accommodations was a train which ran between Memphis and Bowling Green. At the latter point the sleeper was taken by a train from New Orleans and Nashville to Louisville and Cincinnati. In consequence of a wreck just beyond Bowling Green, it became necessary, in the opinion of the authorities, to detour this train at Guthrie, via Nortonville; thence, over the tracks of the Illinois Central Railroad, to Louisville. The sleeper contained quite a number of passengers for Louisville and points beyond. To accommodate the larger number, plaintiff and her daughter, whose destination was Bowling Green, were told of the situation and asked to take seats in the day coach, which would be sent through at once to that point. The distance was only some 45 or 50 miles, requiring a journey of something less than two hours. There was evidence that they were given an election to go around by Louisville in the sleeper, and thence back to Bowling Green by another train, or continue their journey with such accommodations as were obtainable under the conditions. It is not clear, however, that this was understood. We therefore lay this evidence aside, stopping only to observe that a journey to Louisville and then back to Bowling Green would have entailed something like 400 more miles of travel than to have gone direct to Bowling Green, and that it is not at all probable that these ladies would have for a moment agreed to such a circuitous route. It was undoubtedly inconvenient to be aroused from sleep at 3 o'clock in the morning and to change from a sleeper to a day coach, and it must be assumed that the change resulted in some comparative discomfort for the rest of the journey. But traveling is attended with more or less discomfort, and a temporary condition resulting from a wreck ahead compelled the carrier to either detour the only sleeper with the train, or procurable at the time, to accommodate the great number, or to carry it on to Bowling Green for the accommodation of the two passengers destined to that point at the risk of greatly delaying and inconveniencing the greater number.

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The question at last is whether the railroad company breached its contract by detouring this sleeper and thus necessitating a change into the day coach provided. We think not. The sleeper was the property of the Pullman Company, and was carried under a contract between that company and the railroad company. The Pullman Company sold sleeping accommodations to such persons as should be provided with railroad tickets. The railroad company neither sold nor received compensation for such accommodations, and its relation to the whole matter was under its contract with the Pullman Company, and no contract between Mrs. Baldwin and the railroad company is averred or implied, other than the contract to carry her in a first-class car to her destination. It was not therefore a breach of any agreement with Mrs. Baldwin to detour this sleeper under the conditions, provided she was given a seat in a safe and reasonable comfortable car, such a car as ordinarily furnished by well-managed railroad companies, to Bowling Green. There was hardly any dispute about the character of the car in which the plaintiffs finished their journey. The plaintiff, Mrs. Scott, described it in her evidence "as an open smoker," and that a "chill east wind was blowing through it." By "open" she meant that the windows were up. But she admits that she did not complain of this fact, and made no effort to have the windows put down, saying: "As a matter of course I could not control every window in the car." The car was partitioned; one end being used as a smoker. But no smoking occurred while the plaintiffs used it. It was a comparatively new car, with comfortable unholstered seats. The substantial complaint is therefore limited to the fact that the windows in the car were up, or many of them, and the doors open; the car being a vestibuled car. The night had been very close and hot. Toward morning it grew chill; but it was an August night, and it would be somewhat unusual to find a car full of passengers who should, under such circumstances, unite in wishing all of the windows closed. The relation of a carrier to passengers is not that of an insurer. They must exercise a high degree of care in respect to all which concerns their safe transportation, but are only liable for negligence. When it comes to the mere incidents of their personal comfort or discomfort in the matter of open or closed windows, much must be left with the individual passenger. It would be a most unreasonable thing to hold a carrier answerable for the exposure of passengers to such drafts as are ordinarily an incident of travel. Passengers must be expected to exercise some judgment and discretion about the matter of open or closed windows and have some regard to the comfort of each other. Mrs. Scott understood this implied condition of travel, for she explains her failure to complain by saying: "I did not feel like I had the privilege of making every one in the car close their windows." This being one of the incidents, it is plain that the railroad company did not break its agreement to convey her in a first-class car by carrying her in one which had more or less of raised windows,

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especially as the plaintiffs gave the company no notice of special discomfort and no opportunity of locating them where they would be protected as far as possible, having due regard to the rights and comfort of others who might wish fresh air. See *Edmunson v. Pullman Palace Car Co.*, 92 Fed. 824, 34 C. C. A. 382. Neither was there anything in the special circumstances which was likely to require any special attention. True, she was past 70, but she was veiled, and her age therefore not specially noticeable. She was accompanied by her daughter, Mrs. Scott, and the daughter testified that her mother was unusually active for her age and in good health.

The view we have taken of the case was presented to the court by one of the special requests presented by the railroad company, which was denied. That request was upon the plain and indisputable facts of the case applicable and should have been given. The thirteenth assignment of error is sustained for this reason. The request was in these words:

“Each of the plaintiffs alleges that she bought of the defendant, the Louisville & Nashville Railroad Company, ‘a full-rate ticket, by which said railroad company contracted to convey her in a first-class car from Memphis, Tenn., to Bowling Green, Ky. It is not alleged that the Louisville & Nashville Railroad Company agreed or obligated itself to furnish either plaintiff with any particular kind or make of car, or a sleeping car, or that it in any way became obligated to do so. If, therefore, you find that the said Louisville & Nashville Railroad Company furnished plaintiffs substantially a first-class car, then it has complied with its undertaking, and you will find for the defendant, the Louisville & Nashville Railroad Company.”

The learned trial judge did, in substance, so instruct the jury; but he unfortunately coupled it with the condition that they should so find if the plaintiffs were given an option to go on with the sleeper to Louisville and then back to Bowling Green, or by the car which went direct to Bowling Green. It was immaterial, we think, whether such an option was or was not tendered, for passengers could hardly be concluded by declining a circuitous route of some 20 or 24 hours as against one of less than 2 hours in a coach such as they had a right to expect and require. In the view we take of the case it is not necessary to pass upon any of the other assignments.

We find no error of which Mrs. Scott can complain. The Pullman Company's implied contract was to afford Mrs. Scott sleeping accommodation in their sleeper to her destination, provided the railroad company would carry it. *Duval v. Pullman Company*, 62 Fed. 265, 10 C. C. A. 331, 33 L. R. A. 715. The Pullman Company did not detour it. That was the act of the railroad company, which, finding it could not be carried through by Bowling Green without great delay, undertook to carry it to its destination by a longer and different route, thereby serving the larger number. The utmost liability of the Pullman Company



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would be the difference between the schedule rate for sleeping car accommodations from Memphis to Guthrie and from Memphis to Bowling Green. The price of a ticket to each place was the same.

Judgment affirmed.

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(Court of Appeals of Maryland, Dec. 20, 1906.)

[65 Atl. Rep. 415.]

**Carriers—Liability as Insurers—Termination.\***—A carrier's liability as insurer continues after the arrival of the goods at their destination, and until the consignee has had a reasonable time after notice of their arrival in which to remove them.

**Same.†**—The reasonable time within which a consignee after notice of the arrival of his goods at their destination is required to remove them, before the termination of the liability of the carrier as insurer, is such time as will enable one, residing in the vicinity of the place of delivery, and who is informed of the probable time of arrival of the goods and of the course of the carrier's business, to inspect and remove the goods during business hours.

**Same.†**—Goods arrived at their destination early Friday morning. The carrier gave notice of their arrival to the consignee before noon that day. The consignee had the rest of the day and the whole of the following day in which to remove them, and he failed to do so. Held, in the absence of other facts, that the consignee did not remove the goods within a reasonable time, and the liability of the carrier thereafter was the liability of a warehouseman only.

**Same.†**—Goods arrived at their destination Friday morning. The carrier gave notice to the consignee of their arrival before noon of that day. The consignee requested the carrier to hold the goods until Tuesday following; it being inconvenient for the consignee to receive them before that time. The carrier agreed to hold the goods at the consignee's risk. Held, that the carrier was liable only as warehouseman.

**Same.†**—Goods arrived early Friday morning, and the carrier gave notice thereof to the consignee before noon of that day. The consignee requested the carrier to hold the goods until Tuesday following, which the carrier agreed to do at the risk of the consignee who agreed to pay dockage and scowage charges for delivery at a certain

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\*See extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176; foot-notes appended to *Kicht v. Wrightsville & T. R. Co.* (Ga.), 23 R. R. R. 605, 46 Am. & Eng. R. Cas., N. S., 605; *Brunson & Boatwright v. Atlantic Coast Line R. Co.* (S. Car.), 23 R. R. R. 19, 46 Am. & Eng. R. Cas., N. S., 19.

†For the authorities in this series on the question, what is reasonable time within which to remove freight, see foot-notes appended to *Normile v. Northern Pac. Ry. Co.* (Wash.), 13 R. R. R. 194, 36 Am. & Eng. R. Cas., N. S., 194.

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wharf. The charges were to be paid to a third person. Held that, because the goods were held by the carrier beyond the time at which it was ready and had offered to deliver them pursuant to a contract that they were at the risk of the owner during that period, the carrier was liable only as warehouseman.

**Appeal—Errors in Instructions—Right to Complain.**—A party cannot complain of a correct instruction, though it conflicts with erroneous instructions given at his instance.

Appeal from Superior Court of Baltimore City; George M. Sharp, Judge.

Action by the United Fruit Company against the New York & Baltimore Transportation Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before MCSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

*Randolph Barton, Jr.*, for appellant.

*Horace S. Whitman*, and *Thomas F. Cadwalader*, for appellee.

MCSHERRY, C. J. This suit was brought by the appellant, the United Fruit Company, against the appellee, the New York & Baltimore Transportation Company, a common carrier by water, to recover the value of certain goods and merchandise shipped from New York to the appellant in Baltimore in one of the steamers of the appellee, and which, after reaching the appellee's dock in Baltimore and after being unloaded thereon from the steamer and after being stored on the appellee's wharf, were destroyed in the great fire of February, 1904. Part of the goods were shipped under bills of lading which contained the conditions limiting the carrier's liability, and which are inserted in the uniform bill of lading. As no claim is made that the value of those goods thus shipped can be recovered in this action, no allusion need be made to those conditions. The remainder of the goods were shipped on simple receipts, and it is in respect of these latter goods that the questions in this case arise. The steamer reached Union Dock, the Baltimore terminus of the appellee's line, at half past 6 on the morning of Friday, February 5, 1904. The goods were not delivered to the consignee; and, as their destruction by fire whilst in the possession of the appellee is the ground of the pending action, it becomes necessary to inquire and determine in what capacity they were held by the appellee at the time of their destruction, and why they were not delivered to the appellant upon their arrival. To answer these inquiries intelligently a somewhat detailed statement of the testimony must now be made.

There were but four witnesses examined—two on each side. The first witness called was C. C. Buckman, and his testimony shows nothing of consequence beyond the fact that as manager of the appellant company he knew of the arrival of the goods, but not from personal knowledge; and the further fact that it was the custom of the appellee to deliver goods to the appellant com-

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pany at its place of business at Bowley's Wharf. The appellant then produced the witness Irving K. Ward, who testified that at the time of the fire he was acting auditor of the appellant; that the appellee always made free delivery to the appellant company of goods consigned to the appellant in Baltimore; that "the representative of the defendant [appellee] came to the office of the plaintiff [appellant] and saw witness in person, and stated that he had a shipment of plaintiff's [appellant's] that had arrived on his boat, and he wanted to know when he should make delivery. Witness thinks this was on Friday, the day the boat arrived. And as these goods were to be shipped to our people in Cuba, and, not having a steamer to sail before Tuesday, I told him that, if he could arrange to hold those goods until Tuesday, it would be advantageous to us, and he said he would agree to hold those goods until Tuesday, provided we would pay the tugboat and scowage charge from the New York & Baltimore Transportation Wharf to Bowley's Wharf, as the goods had been shipped to be delivered at Bowley's Wharf. He agreed, in consideration of the fact that we paid the expenses for bringing them around there, that he would hold them, because, as he stated, they were in a boat and to take them out and put them on a scow he could send them around to us very easily; but, if he was to keep them there, there would be a double expense, and if we agreed to pay the tugboat charge of the time he would agree to keep the goods, which was done." The judge then asked the witness, "Do I understand you to say that he promised to deliver them on Friday?" And the answer was, "Yes, sir. And you agreed to pay the charges? Yes, sir." The witness continued: "The ordinary method of making delivery was to bring the goods by drays from the New York Line to Bowley's Wharf. \* \* \* The fire destroyed the goods Sunday or Monday so they were never delivered. \* \* \* In consequence of the making of this agreement, the goods were not delivered either on Friday or Saturday." On cross-examination the witness was asked the following questions and gave the following answers: "When you were notified that these goods had arrived, you say you were not ready to receive them? No, sir. Was anything said to you or by you about whose risk they were at?" And he replied, "I do not recollect anything about a risk being mentioned at all."

The appellee (defendant) then proved by George R. Brown that he was at the time of the fire one of the delivery clerks of the appellee, and had been for 20 years. The goods in controversy reached the appellee's (defendant's) wharf about half past 6 Friday morning, February 5, 1904. Witness gave appellant (plaintiff) written notice, "and personally by phone told appellant they were ready to deliver the goods. Reply was that plaintiff would not be ready before Tuesday. Told plaintiff [appellant] they would deliver that morning if plaintiff could take them. Goods were then on ship." He was then asked, "When he refused to accept them, what did you then say?" and he replied, "I told him they were entirely at his risk." If the appellant had ac-

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cepted delivery, the goods would have been taken from the steamer to the scow. They unloaded the goods and put them on appellee's pier. The ship had to sail next day. The goods were properly stored on the pier, in a covered shed, and were then ready for consignee at any time he wanted them. The lighters in which the delivery was to be made are not owned, run, or operated by the appellee, but by the Atlantic Transport Company. The witness further proved that it was the custom of the appellee to deliver free first, second, and third class freight; but that, if fourth, fifth, or sixth class freight was delivered, the appellee charged for it. In all car lots, whether it is free delivery or not, the appellee agreed to deliver all car load freight to consignee's pier if he had a water front, whether it is fourth, fifth, sixth, or first, second, or third class. The appellee further proved by William Riley that in February, 1904, he was notifying clerk of the appellee company; that his duties were to make out notices and take them around and notify people that goods had arrived on appellee's steamers. He took notices to the United Fruit Company on February the 5th of the arrival of all the goods covered by the freight bills offered in evidence, and delivered them at the appellant's office. The blank form of notices which was filled out in each case was as follows: "New York and Baltimore Transportation Line, Baltimore ——— 190—. Landed this day at the Bay Line Wharf, foot Union Dock the following goods, subject to the order and at the risk of ——— who ——— hereby notified to remove the same without delay, as all property is at risk of the owner or consignee after landing on wharf." He delivered the notices about 9 or 10 o'clock in the morning. These notices applied to fourth, fifth, and sixth classes of goods only. In rebuttal the appellant recalled Irving K. Ward, who deposed that he did not have the conversation with Mr. Brown testified to by the latter as a telephone communication; that no other notification of arrival of these goods reached him, except the written notice and the verbal conversation that has been testified to.

The following facts are established by the testimony, and established conclusively and without contradiction: That the goods in question reached the appellee's wharf early on the morning of February the 5th; that the appellee was then ready and willing and offered to deliver them to the consignee according to its accustomed mode of delivery; that the consignee received timely notice on the morning of the 5th of February that the goods had arrived; that it was due to consignee's express request that the goods be held by the carrier that they were not delivered on that day; that the appellee company agreed to hold them until Tuesday at the risk of the appellant, and the latter agreed to defray the expense of transferring them from the appellee's wharf to the appellant's wharf in the scows and by the tugs of the Atlantic Transport Company; that the goods were destroyed by fire on February 7th or 8th, without any fault or negligence on the part of the appellee; and that but for the declension of

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the appellant to accept the goods on the 5th of February they would not have been burned whilst in the possession of the appellee. These facts show why the goods were not delivered to the consignee upon their arrival; and the remaining inquiry is: In what capacity do these facts prove that the goods were held by the appellee at the time of their destruction by fire? And that is the next inquiry because its solution will determine the rule of law by which the liability of the appellee is to be measured.

We all know—it is a familiar doctrine—that a common carrier of goods is an insurer and is responsible for all losses, except those occasioned by the act of God or public enemies, unless there is some valid contractual restriction of that liability. If, then, the goods in controversy—those not covered by the conditions in the uniform bill of lading—were in the custody of the appellee in its capacity as a common carrier, it is liable to the consignee for their value. On the other hand, a warehouseman, being a mere bailee, is bound only to ordinary diligence, and, of course, is responsible for losses caused by ordinary negligence. If, then, the goods in question were in the custody of the appellee as warehouseman, there is no pretense that it was guilty of any negligence whatever, and the consignee would have no cause of action against it for the loss occasioned by the fire. When the goods were received by the New York & Baltimore Transportation Company in New York for the shipment to Baltimore, the duties and responsibilities of a common carrier of freight were at once assumed by it. Now, when did those duties and responsibilities terminate? And when, if at all, did the less rigorous obligations of a warehouseman begin? Laying aside for the moment all reference to the special facts of this case and all considerations of custom, it will be pertinent to determine, first, what is the general rule of law with regard to the termination of the carrier's liability as carrier, and the inception of its liability as a warehouseman; and then the circumstances of this case will be considered in connection with that general rule. There is a decided conflict in the authorities as to when the carrier's liability as such ceases, and its liability as warehouseman only begins. One class of cases adopts what is known as the "Massachusetts rule," whilst another class of cases follow what is called the "New Hampshire doctrine." The Massachusetts rule is this: When the transit is ended, and the carrier has placed the goods in his warehouse to await the delivery to the consignee, his liability as carrier is ended also, though no notice is given to the consignee, and he is responsible as warehouseman only. *Thomas v. Boston & P. R. Co.*, 10 Metc. (Mass.) 472, 43 Am. Dec. 444, approved in *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 263, 61 Am. Dec. 423. This rule has been adopted or followed in Georgia, Illinois, Indiana, Iowa, Missouri, North Carolina, New Jersey, and Pennsylvania. The New Hampshire doctrine holds that the carrier's liability as insurer continues after the arrival of the goods at their destination and



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until the consignee has had a reasonable time in which to call for and remove them, and that the carrier is bound to notify the consignee of the arrival of the goods; and that the reasonable time does not begin to run until such notice, where practicable, has been given. *Moses v. Boston & M. R. Co.*, 32 N. H. 523, 64 Am. Dec. 381, where it was said in commenting on the rule laid down in *Norway Plains Co. v. Boston & M. R. Co.*, *supra*, that the Massachusetts rule was of "a plain, precise, and practical character," but that "by it the salutary and approved principles of the common law are sacrificed to considerations of convenience and expediency." The lead of New Hampshire has been followed by the courts of Alabama, California, Connecticut, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, New York, Ohio, Vermont, and Texas. In the last-named state, as well as in some of the others, the rule is prescribed by statute. Rev. St. Tex. 1895, art. 282. See note to *East Tenn. Virg. & Geo. R. Co. v. Kelly* (Tenn.) 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902, where the two rules are discussed and numerous cases are cited. These differences of opinion had their origin in the rule of the common law requiring actual delivery to the consignee by the carrier. A modification of the rule was made necessary on account of the impracticability of actual delivery by railroad companies or carriers by water, and notice to the consignee and a deposit of the goods in the carrier's warehouse were made a substitute for actual delivery. The cases adopting the Massachusetts doctrine proceed on the theory that a deposit of the goods in the carrier's warehouse is a *quasi* delivery to the consignee's agent, and absolves the carrier from all further liability as to the goods, except such as is assumed by its new relation; such a delivery to itself as the consignee's warehouseman being in lieu of the actual delivery required by the common law. The opposing authorities consider that the changed character of the carrier which renders actual delivery impracticable merely relieves it from such delivery; that it still remains liable until the consignee receives his goods, unless he fails to call for them within a reasonable time. 5 Am. & Eng. Ency. L. 268.

The doctrine of the English cases is substantially the same as the New Hampshire doctrine. The consignee of goods shipped by railway is entitled to a reasonable time, after the goods have arrived at their destination, within which to take them away, and during such time the goods are in the hands of the railway as carrier and subject to all the liabilities which attach to that character. But when such reasonable time has lapsed the company becomes liable as warehouseman merely. *Chapman v. Great West. Ry. Co.*, 5 Q. B. Div. 278. In this case Cockburn, C. J., said: "The contract of the carrier being not only to carry, but also to deliver, it follows that, to a certain extent, the custody of the goods as carrier must extend beyond as well as precede the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure—sometimes one of



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considerable duration. Next, there is the time which, in most instances, must necessarily intervene between their arrival at the place of destination and the delivery to the consignee, unless the latter, which, however, is seldom the case, is on the spot to receive them on their arrival. Where this is not the case, some delay, often a delay of some hours, as, for instance, where goods arrive at night, or late on a Saturday, or where the train consists of a number of trucks which take some time to unload, unavoidably occurs. In these cases, while, on the one hand, the delay, being unavoidable, cannot be imputed to the carrier as unreasonable, or give a cause of action to the consignor or consignee, on the other hand, the obligation of the carrier not having been fulfilled by the delivery of the goods, the goods remain in his hands as carrier, and subject him to all the liabilities which attach to the contract of a carrier. A fortiori will this be the case where there is unreasonable delay on the part of the carrier, if the consignee is ready to receive. The case, however, becomes altogether changed when the carrier is ready to deliver, and the delay in the delivery is attributable, not to the carrier, but to the consignee of the goods. Here, again, just as the carrier is entitled to a reasonable time within which to deliver so the recipient of the goods is entitled to a reasonable time to demand and receive delivery. \* \* \* When once the consignee is in mora by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as warehouseman. He ceases to be liable in case of accident."

The precise question we are considering does not seem to have been passed on in Maryland. We adopt as the more reasonable view the New Hampshire rule, and the doctrine of the English cases; and this brings us to inquire what is a reasonable time, within which, after notice to the consignee of the arrival of the goods, he is required to remove them if he does not wish the liability of the carrier as such to terminate whilst the goods are still actually undelivered. "Reasonable time" has been defined as being such time as would enable one who resided in the vicinity of the place of delivery, and was informed of the probable time of the arrival of the goods and of the course of the carrier's business, to inspect and remove the goods during business hours. 5 Am. & Eng. Ency. L. 270, and cases cited in note 3. Thus, where the consignee was notified after 10 o'clock Saturday morning of the arrival of his goods, and the day was a very stormy one, it was held that a finding that the following Monday morning was a reasonable time for removal would not be disturbed on appeal. *Solomon v. Philada., etc., Ex. Steamboat Co.*, 2 Daly (N. Y.) 104. In *Lemke v. Chi., etc., R. R. Co.*, 39 Wis. 449, where it appeared that the goods arrived at the place of destination on a Saturday evening, and were destroyed by an accidental fire on the Tuesday following about noon, it was held that the owner had had a reasonable time in which to remove them, and that the company's liability as insurer had ceased. In

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the case at bar the goods arrived early on Friday morning, and notice of their arrival was given to the consignee sometime before noon of the same day. There was the rest of that day and the whole of the ensuing day, Saturday, during which the consignee could have removed the goods from the wharf of the appellee. That period was a reasonable time within which the consignee could have removed the goods. When the facts are undisputed, the question of what is a reasonable time is one of law. 6 Cyc. 455, note 47. If there were no other facts in the case than these just mentioned and these are undisputed, then under the English and the New Hampshire rule, at the close of business hours on Saturday, February the 6th, the goods were held by the appellee, not as carrier, but as warehouseman, and it would not be liable for the loss which was caused by the fire of the 7th or 8th, since there is no evidence that the fire was due to or caused by its negligence. But there are other facts which must be alluded to before reaching a final conclusion in the case.

Assuming that according to its custom the appellee was obliged to deliver these goods, they forming a car load lot, to the appellant company at its place of business at Bowley's Wharf, do the facts show that the appellee held the goods at the time of their destruction by fire as carrier or as warehouseman? That question arises on the instruction granted by the trial court at its own instance. After the goods had arrived the consignee was promptly notified, but because it was then inconvenient for it to receive them it requested the carrier not to deliver them, but to hold them until Tuesday following, which the carrier agreed to do at the risk of the owner upon the owner stipulating that it would pay the tuggage and scowage charges for delivery at its wharf. Those charges were not to be paid to the appellee; but to the Atlantic Transport Company. These facts are undisputed. We say the statement that the appellee agreed to hold the goods at the risk of the consignee is undisputed, because, first, the written notice declares that they would be at the risk of the appellant; and because, secondly, the testimony of the witness Brown is explicit to the effect that he so informed the appellant, whilst the plaintiff's witness Ward merely said that he did not "recollect anything about a risk being mentioned at all." His failure to recollect does not constitute a contradiction of Brown's affirmative statement. There are two propositions resulting from these circumstances. We are not dealing with a flat refusal by the consignee after notice to receive the goods. In such an event the law is well settled that the liability of the carrier as insurer terminates and its liability as warehouseman begins. 6 Cyc. 474. The case is one in which, first, the goods were held by the carrier at the request and for the convenience of the consignee; and, secondly, where they were held by the carrier under a distinct agreement that they were at the risk of the owner.

First, The carrier is liable only as warehouseman while the goods are held by the carrier at the request and for the convenience of the consignee. 6 Cyc. 456, and cases in note 50;

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Story on Bailments, § 541. So, where the carrier is ready to deliver the goods, but on account of the lateness of the hour they are left in the depot over night, at the consignee's request, although probably for the convenience of both parties, the carrier remains liable thereafter as warehouseman only, without regard to the length of time that has elapsed since the arrival of the goods. 5 Am. & Eng. Ency. L. 273, citing *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350. The reason for this is obvious. The carrier is entitled to complete its contract and to release itself from its liability as insurer of the goods by promptly delivering them upon their arrival. If, being ready and offering to make the delivery, it is induced by the consignee not to perform that part of its duty and not to perform it merely for the purpose of serving the convenience of the consignee, the latter cannot be permitted, should the goods perish after they would have been delivered but for the request that they should not be delivered, to contend that their nondelivery, occasioned by their destruction in the interim, was a breach of the carrier's original duty to deliver. The consignee's request that the carrier should hold the goods beyond the time at which the carrier was ready and had offered to deliver them cannot, if the carrier complies with that request, prolong the carrier's liability as insurer; because such a request is, in effect, a request that the carrier store the goods in the meantime. And that is what was, in fact, actually done. The goods were unloaded from the ship and were stored on the appellee's pier solely because of that request. The appellant itself proved by one of its own witnesses that it was "in consequence of the making of this agreement the goods were not delivered either on Friday or Saturday." It would be unreasonable to hold the carrier, in such circumstances, to the strict liability of an insurer, because his duty as carrier would be treated, either as at an end or as suspended. One case will suffice to illustrate this proposition. It was decided by the Court of Common Pleas during Trinity term, 1818, and is reported in 8 Taunt. 443, 4 E. C. L. R. 159. It appeared there that Webb & Co. were common carriers from London to Frome. They had been in the habit of carrying wool for the Messrs. Shepherds, who used it in their trade as clothiers. Messrs. Shepherds later on entered into an agreement with Webb & Co. to carry a larger quantity of wool than usual in consideration that they, the carriers, would receive into their warehouse at Frome the wool they should bring from London when it was not convenient for Messrs. Shepherds to take it home, and that the carriers should so receive it without charging Shepherds anything for warehouse room or in any other respect for the keeping of the wool. On the arrival of the wool at Frome it was always sent to the Messrs. Shepherds without delay by the carriers, unless they received notice from the Shepherds that it was not convenient for them to receive it. After such notice was given the carriers stored the wool in their warehouse until they were in-

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formed that the consignee was ready to have it delivered. There was nothing said at the time this agreement was made as to the party at whose risk the wool was to remain while it was deposited in the carrier's warehouse. On May 11, 1816, a quantity of wool belonging to the Messrs. Shepherds was brought by Webb & Co. as carriers, from London to Frome, and, it not being convenient for Messrs. Shepherds to receive it into their own warehouse they sent notice to the carriers that they were not to send it home, but to house it in their warehouse. This was done. It remained there until June the 21st, when the warehouse and a considerable part of the wool were destroyed by an accidental fire. The question upon which the whole case turned was in what capacity was the wool held by the carriers when it was damaged by the fire; but the particular mode in which that question arose is not material. Gibbs, C. J., after referring to the facts in respect to the holding of the wool by Webb & Co. until they were given notice by the owners that the latter were ready to receive it, said: "The consequence is that the character of Webb & Co., as carriers, was suspended from the time of the arrival of the goods at Frome until their delivery to the Messrs. Shepherds; and that during such interval, though the duty of Webb & Co., as carriers, was not discharged, they were not liable as carriers." Burrough, J., said: "I am of the opinion that the duty of Webb & Co., as carriers, was suspended by the special contract between them and the Messrs. Shepherds, and that the goods were in the custody of Webb & Co., not in their capacity as carriers, but under that special contract." Whilst Dallas and Park, JJ., concurred in the judgment, which exonerated the carrier, on the ground that Webb & Co. had completed their duty as carriers, and therefore stood in the relation of warehousemen only. In re Webb, Wallington, Brown and Brice, 8 Taunt. 443.

Second. The goods were held by the carrier beyond the time at which the appellee was ready and had offered to deliver them, under a contract or understanding that they were at the risk of the owner during that period. The testimony on this phase of the case has already been recited and need not be now repeated. Upon the theory that such an understanding has been satisfactorily shown by the evidence, the case of the appellant is at an end. If the goods were to remain on the wharf of the carrier at the risk of the owner, the obligation of the carrier, as carrier, was discharged; because it could no longer be answerable as carrier, and therefore as insurer of the safety, of these particular goods which were not covered by the conditions of the uniform bill of lading, if the goods were to be, by the consent of the consignee, at the risk of the consignee during the period they were stored on the carrier's wharf under that agreement. The attitude of insurer on the part of the carrier, in these circumstances, was incompatible with an assumption by the owner of the risk of the loss of the goods. As that incompatibility resulted from the voluntary act of the owner, the owner cannot

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repudiate the consequence of it, and fasten a loss on the carrier when that loss would not have occurred at all if the carrier had been permitted by the consignee to deliver the goods upon their arrival.

The superior court granted an instruction to the effect that from the undisputed evidence it appeared that at the time of the loss of the goods by fire the appellee held the same as warehouseman, and not as a common carrier; and, as there was no evidence legally sufficient to prove that the loss was due to any negligence on the part of the appellee, the verdict must be for the defendant, the appellee. That instruction was properly granted; and, though it conflicts with instructions at the instance of the appellant, the latter has, on that account, no reason to complain, since the instructions asked by the appellant were themselves erroneous. We have not considered the exceptions reserved by the appellee because it is unnecessary to do so. We find no reversible error on the appeal of the fruit company, and the judgment in favor of the transportation company will be affirmed.

Judgment affirmed, with costs above and below.

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**BRADLEY v. NORTHWESTERN R. Co.**

(Supreme Court of South Carolina, July 10, 1907.)

[57 S. E. Rep. 1101.]

**Carriers—Loss of Freight—Evidence.**—Where several packages are shipped by freight, and one bill of lading is issued, and the connecting carrier received a portion of the shipment, it will be presumed to have received it all.

Appeal from Common Pleas Circuit Court of Sumter County; Hydrick, Judge.

Action by T. M. Bradley against the Northwestern Railroad Company. Judgment for plaintiff before a magistrate was affirmed in the circuit court, and defendant appeals. Affirmed.

*Lee & Moise*, for appellant.

*Jennings & Manning*, for respondent.

GARY, A. J. This action was commenced before a magistrate to recover \$3, the value of a box of snuff lost in transportation, and a penalty of \$50 for defendant's failure to adjust and pay said claim. The facts out of which the controversy arose were as follows: The plaintiff purchased 14 boxes of snuff from a party in New Jersey, who delivered it to the Pennsylvania Railroad System to be transported to Borden, S. C., a station on defendant's line of road, and received from said system the following bill of lading: "Helmetta, N. J., Oct. 14, 1904. By Pa. R. R. System. Consignee, T. A. Bradley, Borden, S. C. A. C. L. Via 14 1-2 Snuff 155." Thirteen of said boxes were delivered

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to the plaintiff by the defendant, but the other box has not been delivered. The magistrate rendered judgment for the amount claimed, whereupon the defendant appealed to the circuit court.

His honor Judge Hydrick made the following order: "This case came up on appeal from the court of magistrate upon several exceptions. After hearing Messrs. Lee & Moise for the defendant appellant and L. D. Jennings for plaintiff respondent, and after careful consideration of the whole case, I find as a matter of fact that the greater portion of the goods, of which a portion was alleged to have been lost, was actually received by the defendant, and I hold as a matter of law that the presumption is that all of said goods were received by the defendant, and that a portion having been received by the defendant company, as is shown by the evidence in the case, the burden was then on the defendant to remove such presumption, and I find as a matter of fact from the testimony that the defendant did not remove such presumption, and, the plaintiff having complied with the law in every respect, I find from the testimony that the defendant is liable, and that the judgment of the magistrate ought to be, and is hereby sustained, and the appeal dismissed. Under my view of this case, I do not deem it necessary to pass upon the question of the constitutionality of section 1710 of volume 1 of the Code of Laws of South Carolina of 1902." The defendant again appealed, and the ruling of the circuit judge as to the presumption arising from the delivery of a portion of the goods is assigned as error.

There was only one bill of lading, and all the goods were delivered for transportation at one and the same time, thus constituting a single transaction. Every reasonable intendment is in favor of the theory that for the convenience of all parties contemplated the boxes would be kept together as a single shipment until they reached their destination. Therefore it is a very natural presumption that the defendant received all, when it is shown that it came into possession of a portion, of the boxes. The ruling of the circuit judge is fully sustained by the recent case of *Walker v. Railway*, 76 S. C. 308, 56 S. E. 952. These views render unnecessary the consideration of the exceptions raising certain constitutional questions.

It is the judgment of this court that the judgment of the circuit court be affirmed.



**ST. LOUIS & S. F. R. CO. v. MCGIVNEY.**

(Supreme Court of Oklahoma, Sept. 5, 1907.)

[91 Pac. Rep. 693.]

**Carriers—Injury to Freight—Presumptions.\***—Where goods shipped over several connecting lines are found to be injured when they reach their destination, there is no presumption that the injury occurred while the goods were in the hands of the first carrier.

**Same—Delivery to Connecting Carrier.†**—If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon his making such delivery.

**Same—Liability of First Carrier.**—If freight addressed to a place beyond the usual route of the common carrier who first received it is lost or injured, the shipper may demand satisfactory information from the first carrier that the injury or loss did not occur on its line, and if such carrier fails to furnish within a reasonable time the proof, in its possession or under its control, tending to show that it was not responsible for the injury or loss, it will be held liable therefor, regardless of whether or not it was in fact responsible for such injury or loss.

**Same—Action against First Carrier.**—The right of a shipper under section 511 of the Statutes of Oklahoma of 1893 to demand of a first carrier proof that loss of or injury to freight addressed to a point beyond its usual route, where it has been delivered to a connecting carrier, to the effect that the loss or injury did not occur on its line, does not prohibit a shipper in the first instance, without such demand, from bringing an action for damages for an alleged loss or injury.

**Same.**—The purpose of the statute is to put the shipper in possession of the information which is in the possession or under the control of the first carrier, so that he may determine what carrier caused the injury, and obtain satisfaction therefor without being compelled to bring a multiplicity of actions.

**Appeal—Determination—Remand for New Trial.**—Where a plaintiff fails to offer any evidence in support of an allegation of a petition which, if proven, would authorize a recovery, and the case is appealed to this court, such allegation, for the purposes of the appeal, will be deemed to have been waived; and while, in case of a reversal and remanding for a new trial, evidence might, on such trial, be offered in

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\*For the authorities in this series on the subject of the burden of proving which carrier was guilty of the negligence causing loss or injury to freight transported over several connecting lines, see foot-notes appended to *Norfolk & W. Ry. Co. v. Wilkinson* (Va.), 23 R. R. 290, 46 Am. & Eng. R. Cas., N. S., 290.

†See foot-note appended to *St. Louis S. W. Ry. Co. v. Kilberry* (Ark.), 24 R. R. 567, 47 Am. & Eng. R. Cas., N. S., 567.

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support thereof, this court will not order a new trial for the purpose of affording such opportunity, as it is the duty of a litigant to offer all of his evidence at the first trial at which the law permits him to do so.

(Syllabus by the Court.)

Error from District Court, Grant County; before Justice James K. Beauchamp.

Action by L. W. McGivney against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed. Action dismissed.

*Flynn & Ames* and *R. A. Kleinschmidt*, for plaintiff in error.  
*Mackey & Mackey*, for defendant in error.

BURWELL, J. The appellee, L. W. McGivney, shipped a car of corn from Salt Fork, Okl., to Henrietta, Tex., according to the bill of lading as follows: "From Salt Fork, Oklahoma, to Sherman, Texas, over the St. Louis & San Francisco Railroad Company; from Sherman, Texas, to Ft. Worth, Texas, over the Houston & Texas Central Railroad Company; and from Ft. Worth, Texas, to Henrietta, Texas, over the Ft. Worth & Denver City Railroad Company." There was a delay in delivery, and, when the car finally reached Henrietta, over the Ft. Worth & Denver Railroad, it was so damaged that the consignee refused to receive it. The appellee made a claim to the Ft. Worth & Denver Company, which was by that company referred to the appellant company and investigated by it, and finally the appellee brought suit for the value of the corn.

There is absolutely no evidence in the record that in the slightest degree indicates that corn was damaged while in transit over the appellant's road, and the fact that the car was received by a connecting line carries with it the presumption that it was in good condition when delivered by the appellant to such connecting road. The appellee has proceeded upon the theory that, because the appellant company received his corn for shipment and loss occurred, it is primarily liable to him, without regard to negligence on the part of appellant. Such is a mistaken theory of the law. Where a common carrier receives freight for transportation to a point beyond its line, under a contract that it will deliver it to a connecting carrier and will not be liable for damages not occurring on its own line, and the goods are received by the connecting carrier without objection, the presumption of law is that the freight was in the same condition when delivered to the connecting carrier as it was when received by the initial carrier; and if the freight is damaged when it reaches its destination, in the absence of proof, the presumption is that the damages occurred while the property was in the possession of the last carrier. This identical question was decided by the Supreme Judicial Court of Massachusetts in the case of *Farmington Mercantile Co. v. Chicago, B. & Q. R. Co.*, 166 Mass. 154, 44 N. E. 131. Mr. Justice Holmes,

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the present member of the Supreme Court of the United States, participated in the opinion, although it was written by Mr. Justice Allen. The court said: "When goods shipped over several connecting lines are found to be injured when they reach their destination, there is no presumption that the injury occurred while the goods were in the hands of the first carrier." The Supreme Court of Alabama, in the case of *Louisville & N. R. Co. v. Jones*, 100 Ala. 263, 14 South. 114, said: "Where goods are delivered to a carrier for transportation to a point beyond its own line under a through bill of lading, which stipulates against liability for injury beyond its own line, and the goods are in a damaged condition when delivered by the connecting carrier to the consignee, the presumption is that the receiving carrier delivered them to the connecting carrier in good condition, and the presumption must be overcome before the consignor can recover for such damage from the receiving carrier."

In 6 Cyc. p. 490, § 7, the law is declared as follows: "Under the American rule that, in the absence of partnership relations of contract for through transportation, each of the carriers is alone liable for loss or damage occurring during his part of the transportation, the action may be brought directly against the carrier on whose line the loss or injury occurred. To render the first carrier liable, it must appear that he failed to deliver the goods to the connecting carrier, or delivered them in damaged condition. The second or subsequent carrier is not to be held liable in an action against him until it appears that he received the goods in sound condition and that loss or injury happened to them while in his possession. But on proof of delivery to the first carrier in good condition and receipt by the second carrier without objection, it will be presumed, in an action against the second carrier, that the goods were still in the condition in which they were received by the first carrier. Indeed, the weight of authority seems to be in support of the general proposition that, if the goods are delivered by the last carrier in damaged condition, the presumption arises, without further evidence, that the damage occurred while in the possession of the last carrier, and that the burden is upon him to prove that they were in the damaged condition when received by him; the double presumption being entertained that they were accepted in good condition by the first carrier and that such good condition continued until their receipt by the last carrier, notwithstanding transportation over intermediate lines."

Under the law a common carrier is not bound to receive goods from a connecting carrier for transportation which are damaged, or, if it receives them, it is entitled to have the receipt given therefor, or the records of shipment show the real condition of the goods when it received them; and the presumption is that a second carrier, or any carrier, will not receipt a former carrier for goods as being in good condition when they are already damaged. It is because of the right of a subsequent carrier to have the record speak the truth that the law, in the absence of a record or proof to the contrary, presumes that goods or freight were in

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good condition when received from a connecting carrier. The Legislature of this territory has recognized the rule stated above, as will be seen from the following sections of the Statutes of Oklahoma of 1893:

“Sec. 510. If a common carrier accepts freights for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon his making such delivery.

“Sec. 511. If freight, addressed to a place beyond the usual route of the common carrier who first received it, is injured or lost, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor.”

From section 510 it will be seen that the liability of the first carrier ceases when it delivers freight to a competent connecting carrier carrying freight in the direction of the destination thereof. And section 511 provides that where freight is received by a common carrier, and its destination is beyond the usual route of the carrier first receiving it, and such freight is lost or injured, the first carrier must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in its charge, and if it fails to furnish such proof it will itself be liable therefor.

It is insisted that the word “demand” meant by the statute is a demand for payment for the loss. We do not think so. The statute, recognizing that the first carrier can easily furnish proof as to whether or not the loss occurred on its line, has provided that it must furnish the shipper with satisfactory proof within a reasonable time that it was not responsible for such loss. The shipper, under the statute, may go to the first carrier and request it to furnish proof that the injury did not occur on its line, so that it may be able to locate the carrier responsible for the injury and sue it, if necessary; but if the first carrier fails to furnish the proof within a reasonable time, showing that the loss did not occur on its line, then it will be held liable therefor, regardless of whether or not it was, in fact, responsible for the injury to the freight. And under this section the shipper is entitled to full and complete information regarding the shipment so far as known to the first carrier, which could be used by such carrier in defending an action for damages therefor; that is, to all of the proof in its possession or under its control at the time that would tend to show that the first carrier was not responsible for the loss. The penalty for failing to furnish such proof is absolute liability on its own part to pay the damages sustained. It must, however, be observed that this statute is not intended to prohibit one who has sustained loss by reason of injury to freight from suing the first carrier without such demand; but, when he does so, the burden is on the shipper to show

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by a preponderance of the evidence that the injury was the result of the negligence of such first carrier. The statute was enacted primarily for the benefit of the shipper; but when he fails to avail himself of its conditions in the first instance, and sues the first carrier without such demand, he cannot then take advantage of its provisions, after the first carrier has been put to the trouble and expense of defending an action against it. The statute is intended to require the first carrier to furnish to the shipper on demand that information which, in the absence of the statute, the shipper could only compel in an action against it or some other connecting carrier.

The appellant has made other assignments of error, such as the barring of the cause of action by reason of the statute of limitation, and misdirecting the jury on questions of law; but it is not necessary to discuss them, as under the record presented the plaintiff must fail to recover. There are some allegations of the petition which, if proven, would make the appellant liable in damages; but, as there was absolutely no evidence offered as to them so far as this appeal is concerned, they are deemed to have been waived. If the case were reversed and remanded by reason of error committed in the trial below on those issues which were litigated, the appellee would not be precluded from offering evidence on another trial, under any proper allegation of his petition. But, when, on the trial of a case in the lower court, a party omits to offer evidence on an issue formed by the pleadings, and this court finds that he must fail under the evidence offered, and that he cannot recover on any of the issues tried, this court will not remand the case for a second trial under the theory that he might possibly make out a case or defense under allegations of his petition or answer which he did not support by evidence on the former trial. It is the duty of a party on a trial to litigate his whole case and each and every part thereof at the first opportunity, and if he fails to do so he cannot complain if the appellate court deems those issues not litigated as waived.

The judgment of the lower court is hereby reversed, at the cost of appellee, and the cause dismissed, with prejudice. All of the Justices concurring, except IRWIN, J., absent.

MOSS *v.* LANCASTER & YORK FURNACE ST. RY. CO.

(Supreme Court of Pennsylvania, June 3, 1907.)

[67 Atl. Rep. 869.]

**Carriers—Injuries to Passengers—Connecting Lines.\***—A street railway company sold a return ticket to a point on another railway with which it connected and ran a car operated by its own crew to the point in question. Held, liable to a purchaser of the ticket injured by the negligence of its employees while the car was running on the connecting line.

## Appeal from Superior Court.

Action by Rebecca J. Moss against the Lancaster & York Furnace Street Railway Company. From a judgment of the Superior Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

The opinion of the Superior Court, by Orlady, J., was as follows:

"There was sufficient evidence in this case to warrant the jury in concluding that the defendant company agreed to carry the funeral party, of which the plaintiff was a member, from Lancaster to Mt. Nebo. A special rate of fare was exacted and paid, and, while the special tickets appear on their face to be good only from Lancaster to Martic Forge and return, the car in which the party was carried to Mt. Nebo was under the personal charge of the defendant's superintendent, and its crew consisted of a conductor, motorman, and sander. The principal contention of the appellant is that there is no evidence to show that the defendant company had any authority to run their car over the line from Martic Forge to Mt. Nebo, it being a road owned by an independent company, and that the running of the car from Martic Forge to Mt. Nebo 'was beyond the scope of the power and authority of either the superintendent or president of the defendant company, and even though the facts were found that the superintendent did run, and the president agreed to its running, such agreement and their action would not be binding upon the defendant.' The defendant's superintendent and crew did in fact run the car from Martic Forge to Mt. Nebo in consideration of the fare paid by the passengers in that car, and on the return trip while in full control of the car were so negligent in their management of it as to cause the accident in which the plaintiff was injured. The roads were connected with intersecting

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\*See generally, foot-notes appended to *Lehigh Valley R. Co. v. Dupont* (C. C. A.), 12 R. R. R. 83, 35 Am. & Eng. R. Cas., N. S., 83; foot-notes appended to *Prethrow v. West Jersey & S. R. Co.* (Pa.), 24 R. R. R. 211, 47 Am. & Eng. R. Cas., N. S., 211; *St. Louis, etc., R. Co. v. White* (Tex.), 20 R. R. R. 796, 43 Am. & Eng. R. Cas., N. S., 796.



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switches and connecting trolley wires so as to make a continuous system. It is conceded that the party was carried from Lancaster to Millersville over an independent road, and it would be unreasonable to exact of one who pays fare to a destination to inquire into the charter rights of the carrying company throughout the course of travel where the defendant's officers, whose negligence caused the accident, had entire charge of the power propelling it. The apportionment of equities and liabilities between the several roads over which the car was run may well be left to be adjusted by the companies themselves. The Lancaster & Southern Railway Company (from Martic Forge to Mt. Nebo) did not contribute to the accident to this plaintiff. Its roadbed was intact, but the car was so recklessly managed that the crew lost control of it on a grade, and then abandoned it by jumping from it. In the light of the proof, which was clear and practically undisputed, this plaintiff paid the fare asked by the defendant and was not simply presumably a passenger, but was properly to be considered as one in the legal sense of the word. The disputed questions of fact as to the cause of the accident were carefully left to the jury in a full and adequate charge. The assignments of error are overruled, and the judgment is affirmed."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

*W. U. Hensel, J. H. Byrne, and A. F. Hostetter, for appellant.*  
*C. E. Montgomery, G. Ross Eshleman, and Leo Macfarland, for appellee.*

BROWN, J. The Lancaster & York Furnace Street Railway Company owns and operates a trolley road from Millersville through Martic Forge to York Furnace, in the county of Lancaster. At Martic Forge the road of the Lancaster & Southern Railway Company connects with it. This road runs southwardly through Mt. Nebo. On March 21, 1905, the plaintiff below, with a number of other persons, went from Lancaster to Mt. Nebo to attend a funeral. According to the testimony offered by her, arrangements had been made with the president of the defendant company to carry the funeral party from Lancaster to Mt. Nebo for 55 cents for the round trip. The defendant evidently had some traffic contract with the Conestoga Traction Company, operating a street railway from Lancaster to Millersville, for, under the tickets issued to them by the defendant, the party were carried over this road to Millersville, where they took the car of the defendant at the point of its connection with the line of the Conestoga Traction Company. Upon reaching Martic Forge the car was switched over to the tracks of the Lancaster & Southern Railway Company and taken to Mt. Nebo. On a steep down-grade, on the return trip, the accident occurred in which the plaintiff was injured. The undisputed facts are that when the car reached Martic Forge it was switched over on the tracks of the Lancaster & Southern Railway Company by the employees

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of the defendant—the same motorman and conductor that had brought it from Millersville—and this in the presence of its superintendent. He had come with them from Millersville. He rode with them over the Lancaster & Southern Road to Mt. Neno, started back with them on the return trip, and jumped with them from the car when it got beyond their control.

On this appeal from the judgment against it for its negligence, the appellant contends that the running of its car over the tracks of the Lancaster & Southern railway was beyond the scope of the power or authority of either its superintendent or president, and therefore, “even though the fact were found that the superintendent did run, and the president agreed to its running, over this road, such agreement and their action under it would not be binding upon the defendant.” For this reason we are asked to reverse the judgment. This, in effect, means that, before the plaintiff trusted herself to the employees of the defendant in running its car over the tracks of the other company, she ought to have inquired whether the president and superintendent had been duly authorized by the board of directors to use the tracks of that company. But little consideration was given this by the Superior Court. We cannot give it more. When the appellant received the plaintiff in its car at Millersville, she became its passenger under an express contract with its president to carry her not only to Martic Forge, but to Mt. Nebo. Upon reaching Martic Forge, it did not transfer her to a car of the Lancaster and Southern Railway Company, but, keeping her in its own car, switched the same over onto the tracks of the independent company for the purpose of being taken by its own superintendent, conductor, and motorman to the place of the funeral, and the superintendent testified that the car was put upon the other tracks in pursuance of information from his superior officers. Under the circumstances, the plaintiff was as much the passenger of the defendant company when the car started over the tracks of the Lancaster & Southern Railway Company as she had been between Millersville and Martic Forge. The tracks of the Lancaster & Southern Railway Company were made the tracks of the defendant company *pro hac vice* by its president and superintendent, and for its negligence while running its car over them its responsibility is just what it would have been if the accident had occurred between Millersville and York Furnace.

Judgment affirmed.

ATLANTIC CITY R. CO. *v.* KIEFER.

(Supreme Court of New Jersey, June 10, 1907.)

[66 Atl. Rep. 930.]

**Carriers—Who Are—Question for Jury.\***—Whether a person who has alighted from a standing train at a station, and who is crossing the railway tracks, by a planked way provided by the company for that purpose, after the train from which he has alighted has moved out, is still a passenger entitled to so cross without looking or listening, is a question of fact for the jury, where, under the proof, reasonable men may differ as to whether he was proceeding from the station platform to a place of safety within a reasonable time after he had alighted from the train.

(Syllabus by the Court.)

Error to Circuit Court, Camden County.

Action by Bertha Kiefer, administratrix, against the Atlantic City Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Argued February term, 1907, before FORT, PITNEY, and REED, JJ.

*J. Willard Morgan and Thompson & Cole*, for plaintiff in error.

*John W. Wescott and Ralph W. E. Donges*, for defendant in error.

FORT, J. On August 31, 1903, Charles W. Kiefer was a passenger on a train of the Atlantic City Railroad Company, leaving Camden at 6:42 p. m., and due at Clementon Station at 7:15 p. m. The train arrived at the Clementon Station on time, and Kiefer alighted from it on the station platform on the west of the tracks. The railroad at this point is double tracked; the tracks extending north and south. The station building at Clementon is on the west side of the tracks, and there is also a platform on the east side. From the station platform on the west to the passenger platform on the east there is a planked passageway across the tracks, which is provided for the use of passengers in crossing from one platform to the other, as well as generally by the passengers when leaving or boarding the

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\*For the authorities in this series on the question, who are, and are not, passengers, see foot-notes appended to *Malott v. Central Trust Co. (Ind.)*, 22 R. R. R. 189, 45 Am. & Eng. R. Cas., N. S., 189; foot-note appended to *Chicago Union Traction Co. v. Rosenthal (Ill.)*, 21 R. R. R. 746, 44 Am. & Eng. R. Cas., N. S., 747; foot-notes appended to *Waller v. Wilmington City Ry. Co. (Del. Sup'r Ct.)*, 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; foot-notes appended to *Smallwood v. Baltimore & O. R. Co. (Pa.)*, 21 R. R. R. 290, 44 Am. & Eng. R. Cas., N. S., 290; foot-notes appended to *Colorado Springs, etc., Ry. Co. v. Petit (Colo.)*, 21 R. R. R. 132, 44 Am. & Eng. R. Cas., N. S., 132; *Illinois Cent. R. Co. v. Porter (Tenn.)*, 20 R. R. R. 686, 43 Am. & Eng. R. Cas., N. S., 686.

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trains. There was no fence between the tracks, nor other obstruction on the railway right of way at this point. It also appeared by the proof that, on leaving the train, passengers alighted from either side of the cars, as suited their convenience.

On the night in question several passengers alighted from the east side of the train and passed over the track adjoining that on which the train stood to the platform on the east, and thence off the same to the highway to go to their respective homes. Kiefer's most direct way to go home was to go across the tracks from the west platform, on which he alighted, to the east platform, and thence to the highway. On the night in question the train from which Kiefer alighted stood directly over the planked way. After he alighted the proof is that he stopped long enough to light his pipe, he having gone across the west platform to the side of the station building for this purpose. After lighting his pipe and after the train from which he alighted had pulled out for a distance, variously estimated by the witnesses as being from 175 to 700 feet from the place where he had alighted from the train, he proceeded to cross the tracks by the planked way from the station platform on the west to the passenger platform on the east, and was killed by an express train coming from the opposite direction from that taken by the train from which he alighted.

On this state of facts a nonsuit was asked, and, when the case was closed, there was also a motion for the direction of a verdict for the defendant. These motions, we think, under the authority of the case of *Atlantic City R. R. v. Goodin*, 62 N. J. Law, 394, 42 Atl. 333, 45 L. R. A. 671, 72 Am. St. Rep. 652, were rightly denied. Under the proof, (1) whether the deceased was a passenger, or (2) whether he was guilty of contributory negligence in what he did, or (3) whether the defendant was guilty of negligence in operating its trains, were all questions for the jury.

The plaintiff made three requests to charge, all of which were charged. The third request was as follows: "The deceased, Mr. Kiefer, was a passenger so long as he was lawfully and with ordinary care using the foot crossing in question for the purpose of crossing the defendant's tracks to get upon the public highway." The objection urged against the law as thus declared is that it took from the jury the question of whether Kiefer was or was not a passenger at the time he was killed, and substituted therefor the mere fact that he was lawfully crossing the tracks at the time he was killed. If so, the charge was erroneous. If he was not a passenger at the time he was struck, he was required, in crossing the tracks, to exercise all the care that a reasonably prudent man would exercise in crossing railway tracks under like circumstances. The plaintiff's proof disclosed the fact that the deceased neither looked nor listened as he crossed, and it was therefore for the jury to say, if they found he was not a passenger, whether he was or was not guilty of contributory negligence in thus crossing. Whether, therefore, Kiefer was bound to anticipate the approach of a train from the opposite direction de-

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depends upon whether the jury should say, under the proof, that he was at the time he was hit still a passenger, passing from the train to a place of safety off the premises of the defendant company by the way provided by the defendant for that purpose. The effect of charging the third request was to practically charge that Kiefer was a passenger so long as he was lawfully crossing the tracks of the company, no matter how far the train from which he had alighted had moved out. The jury was told that Kiefer was a passenger so long as he was lawfully and with ordinary care using the planked way for the purpose of crossing to get to the public highway. This made the deceased a passenger from the mere fact that he was lawfully and with ordinary care crossing the planked way. One may be lawfully using a crossing such as the planked way proven in this case, and still not be a passenger. A railway track is a place of known danger, and the care required of one crossing the same who is not a passenger is such as is commensurate with the danger—the care that a reasonably prudent man would take under like circumstances. One might be crossing this planked way after having visited the station for any lawful purpose, and hence be lawfully using the same, but this would not excuse him from the duty to look or listen for approaching trains. Whether a person passing across a railway track by a planked way provided for that purpose, after he has alighted from the train and after it has moved out from the station, is still a passenger and entitled to cross without looking or listening, is a question of fact for the jury, if there be controversy under the proof as to whether the person claiming to have been a passenger proceeded from the station to a place of safety within a reasonable time after alighting from the train. The rule is that the relation of passengers and carrier, when established, does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged. 4 Elliott on Railroads, § 1592; *Houston & T. C. R. Co. v. Batchler* (Tex. Civ. App.) 83 S. W. 902; *Imhoff v. C. & M. R. Co.*, 20 Wis. 344; 5 Am. & Eng. Ency. of Law, p. 497. The relation of carrier and passenger continues until the passenger has left the carrier's premises, or has been allowed a reasonable time to leave the premises. *Hansley v. Jamesville & W. R. R. Co.*, 115 N. C. 602, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep 474. What, under all the circumstances, is a reasonable time, is a question of fact for the jury. *Houston & T. C. R. Co. v. Batchler* (Tex. Civ. App.) 83 S. W. 902.

Reasonable time is defined in *Imhoff v. C. & M. R. Co.*, *supra*, as the time in which persons of ordinary care and prudence, under like circumstances, get off the car. The mere fact that a person is lawfully crossing a railway track is not enough to entitle him to claim the rights of a passenger. A person alighting from a standing train, and crossing the tracks to get to the station platform, a place of safety, is undoubtedly a passenger, and is not required to look or listen in anticipation that a train may pass and hit him.

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That law is too familiar to require any citation of authority. But this rule does not apply after the train moved out. *Goldberg v. N. Y. C. & H. R. R.*, 133 N. Y. 561, 30 N. E. 597. How long may a person remain at a station, after alighting from the train, and after it has moved out, before crossing the tracks to get to a place of safety, and still remain a passenger and be freed from any duty to look out for himself in such a place of known danger? The court cannot, in such a case, take from the defendant the right to have the jury say whether the person injured was or was not a passenger. There must be some period of time after a train moves out of a station, when even one who has been a passenger, although lawfully crossing, cannot go blindly across the tracks without using any care to protect himself against the dangers that are always to be anticipated when crossing railway tracks. *Hansley v. Jamesville & W. R. R. Co.*, *supra*.

In this case the proof was that the deceased, at the time he was hit, was not looking, but was walking leisurely with his head down. It was not even a clear case, under the proof, for refusing a nonsuit, but it certainly was a case where the jury must first find; to entitle the plaintiff to recover, that at the time the deceased was injured he was still a passenger, and hence free from the obligation to look or listen. If they cannot so find, there should be a verdict for the defendant, notwithstanding the fact that the person injured was lawfully crossing the tracks when the accident happened. One may be lawfully crossing railway tracks, and still not be a passenger entitled to assume that a train will not be moved along the tracks while he is crossing them to reach a place of safety, or for some other lawful purpose. A person who may be lawfully upon railway tracks, but who is not found to be a passenger, has no rights that rise higher than those which flow from the fact that he is upon the tracks by the defendant's invitation, and the law does not relieve such a person from the duty to exercise care commensurate with the dangers surrounding him.

The judgment of the Camden county circuit court is reversed, and a venire de novo awarded.



## FORBES v. CHICAGO, R. I. &amp; P. RY. CO.

(Supreme Court of Iowa, Oct. 23, 1907.)

[113 N. W. Rep. 477.]

**Carriers — Passengers — Contributory Negligence.\***—A passenger, who, while the train was in motion, leaves his seat and goes on the platform of the car to alight on the train coming to a stop, does not violate Code, § 4811, prohibiting persons getting off a train while in motion, and is not guilty of contributory negligence as a matter of law precluding a recovery for injuries sustained in consequence of the sudden jerking of the train while he was on the platform.

**Same—Evidence—Instructions.**—Where, in an action for injuries to a passenger, the evidence showed that while the train was in motion he left his seat and went on the platform to alight on the train coming to a stop, and that in consequence of the jerking of the train he was thrown from the platform, the refusal to charge that he was guilty of contributory negligence in getting off a moving train was proper.

**Same.**—Where, in an action for injuries to a passenger, the evidence showed that while the train was in motion he left his seat and went on the platform to alight on the train coming to a stop, and that by the jerking of the train he was thrown from the platform, an instruction that if he attempted to alight while the train was, to his knowledge, in motion, he could not recover, was not erroneous as limiting contributory negligence to the act of stepping off the train in motion, under Code, § 4811, prohibiting passengers from getting off a train while in motion.

**Same—Relation between Carrier and Passenger—Termination of Relation.†**—A passenger who fails to alight from the train at the destination to which he purchased a ticket is not a trespasser, and if he remain on the train, which is one on which passengers are entitled to ride, it must be presumed that he intends to pay the proper fare, and, until this presumption is overcome by evidence that he intends to be carried without payment of fare, he is entitled to the protection of a passenger.

Appeal from District Court, Wappello County; M. A. Roberts, Judge.

Action to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of defendant's employees, while plaintiff was a passenger on defendant's

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\*For the authorities in this series on the question whether it is contributory negligence in a passenger to stand on the platform of a street car or steam railroad car, see foot-notes appended to *Louisville & N. R. Co. v. Mulder* (Ala.), 23 R. R. R. 66, 46 Am. & Eng. R. Cas., N. S., 66.

†For the authorities in this series on the question, who are, or are not, passengers, see preceding case, and foot-note.

*Forbes v. Chicago, etc., Ry. Co*

train. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

*Carroll Wright, J. L. Parrish, and William C. McNett*, for appellant.

*Jaques & Jaques*, for appellee.

MCCCLAIN, J. The evidence tended to show that, when defendant's train arrived at the station of Floris, plaintiff, who was a passenger on the train, left his seat and proceeded to the platform for the purpose of alighting, that place being his destination; and that before he had alighted the train started with a sudden jerk, and he was thrown from the steps of the car to the station platform and received the injuries complained of. The allegation of negligence on the part of defendant's employees was that without warning the train was started up suddenly, and before plaintiff had reasonable time to alight.

The questions argued for plaintiff relate entirely to plaintiff's alleged contributory negligence. It is claimed that as it is made a crime by Code, § 4811, to get off of a train while it is in motion, plaintiff was guilty of such contributory negligence in attempting to do a prohibited act as to defeat his recovery. It is sufficient to say, however, that the prohibition is of the act of getting off of a train while in motion, and the evidence does not show that plaintiff attempted to actually step or pass from the car to the station platform, but only that he had taken a position on the step of the car ready to get off and was thrown from his position by the jerking of the train. The argument for appellant seems to be that plaintiff's entire procedure after leaving his seat constituted a continuous attempt to get off a moving train; whereas the evidence tends to show that he had no purpose at any time to leave the train while in motion, but went upon the platform of the car for the purpose of leaving the train while it was standing. No authorities are cited to sustain the position that it is negligence on the part of a passenger to leave his seat and pass along the aisle and out upon the platform of the car while the train is in motion, preparatory to alighting when the train shall stop. There was no error therefore in refusing to take the case from the jury because of the alleged contributory negligence on the part of the plaintiff, nor in refusing to give the instruction asked, to the effect that plaintiff was guilty of contributory negligence in getting off a moving train.

The jury was instructed that, if the plaintiff attempted to get off the train while it was, to his knowledge, still in motion, he could not recover; and this instruction is complained of because it limited the contributory negligence, under the statute cited above, to the act of stepping off the train in motion. But, as already indicated, we think this instruction was correct. If the contributory negligence relied on by the defendant was that of being on the platform while the train was in motion, it is sufficient to say that the court instructed the jury fully on this sub-

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ject and directed a finding for the defendant if they should determine that the plaintiff was negligent in this respect.

The court instructed the jury that, even though the train had been stopped at the station for a reasonable length of time for passengers to alight, yet, if it was started up with a jerk in such violent manner as to injure the plaintiff or other passengers, who were at the time in the exercise of reasonable and ordinary care for their own safety, such act in starting up in such manner would be negligence if the plaintiff was injured, and if the plaintiff was at the time in the exercise of ordinary care for his own safety he could recover. To this instruction it is objected that after plaintiff had had a reasonable time to alight he was a trespasser on the train, and the defendant owed him no duty, except not to injure him. Some countenance for this contention may perhaps be found in the cases cited for appellant. *St. Louis S. W. R. Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089; *Chicago, K. & W. R. Co. v. Frazer*, 55 Kan. 582, 40 Pac. 923. But in the *Frazer* Case the passenger was riding on a construction train and had reached the termination of the road so far as it was open for the operation of trains, and the court therefore very properly held that if he remained longer on the train he was not there as a passenger. It cannot be true, however, as a general proposition, that when a passenger fails to alight from the train at the destination to which he has purchased a ticket he becomes a trespasser. If he sees fit to remain upon a train which is one upon which passengers are entitled to ride, it must be presumed that he intends to pay the proper fare, and, until this presumption is overcome by some evidence that he intends to be carried without payment of fare, he is entitled to the same protection as any other passenger. The sole question therefore was as to plaintiff's contributory negligence, and, as before indicated, this was submitted to the jury under proper instructions.

We find no error of which appellant can justly complain, and the judgment is therefore affirmed.

## CINCINNATI, N. O. &amp; T. P. Ry. Co. v. MOUNTS.

(Court of Appeals of Kentucky, Oct. 23, 1907.)

[104 S. W. Rep. 748.]

**Carriers—Injury to Passenger—Failure to Warm Waiting Room.\***  
—Under Ky. St. 1903, § 784, providing that railroad companies shall keep their waiting rooms comfortably warm in cold weather, and

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\*For the authorities in this series on the subject of the duties of a carrier of passengers with respect to the furnishing and maintenance of waiting rooms for passengers, see foot-notes appended to *Chicago & A. R. Co. v. Walker* (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; foot-notes appended to *St. Louis, etc., R. Co. v. Marshall* (Kan.), 18 R. R. R. 398, 41 Am. & Eng. R. Cas., N. S., 398.

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also at common law, railroad companies are liable for any injuries sustained because of failure to maintain a fire in the waiting room, if necessary to make it comfortable.

**Same—Personal Injuries—Condition and Use of Premises.**—In an action against a railroad company to recover damages for a violent cold contracted while waiting in the depot for a train, evidence examined, and held sufficient to sustain a verdict that the company was negligent in failing to have its waiting room in a reasonably safe and comfortable condition for passengers.

Appeal from Circuit Court, Mercer County.

“Not to be officially reported.”

Action by Anna Mounts against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for the plaintiff, defendant appeals. Affirmed.

*E. H. Gaither* and *John Galvin*, for appellant.

*E. V. Puryear*, *Robt. Harding*, *Hill & McRoberts*, and *Greene & Van Winkle*, for appellee.

CARROLL, J. On the evening of October 29, 1904, appellant, on her way to Danville, Ky., went into the waiting room of the depot of appellant at Burgin to remain until the arrival of the train on which she took passage to Danville. The evidence as to the length of time she remained in the station is conflicting. Some of the witnesses say that she was there about an hour, others about 30 minutes, before the arrival of the train on which she desired to take passage. There is also sharp dispute as to the temperature and condition of the weather; the evidence for appellee conducing to show that it was a cold, chilly, and disagreeable day, that for appellant that the thermometer registered 57 degrees, the weather being mild and temperate. Appellee, alleging that the waiting room provided for passengers at Burgin on the occasion mentioned was so cold and uncomfortable as to cause her to contract a deep and violent cold, as the result of which she was confined to her bed for several days and suffered great pain, brought this action to recover damages growing out of the neglect of appellant to provide a comfortable waiting room for passengers. Upon the trial she recovered \$400.

No complaint is made of the instructions, nor is there any objection or exception to the evidence introduced; but it is insisted that the testimony, as a whole, established that appellant was not guilty of any negligence in failing to have the waiting room heated by a fire, and that appellee's illness and suffering were due to her failure to exercise ordinary care for her own comfort and protection. It is conceded that there was no fire in the waiting room, and it is not denied that the attention of the station agent was called by a person in the waiting room to its chilly and uncomfortable condition, and a request made to have a fire started. Section 784 of the Kentucky Statutes of 1903 provides, in part, that “all companies shall keep their ticket offices open for the

*Lytle v. Galveston, etc., Ry. Co*

sale of tickets at least thirty minutes immediately preceding the schedule time of departure of all passenger trains from every regular passenger depot from which such trains start or at which they are regularly stopped; and shall open the waiting room for passengers at the same time as the ticket office, and keep it open and comfortably warm in cold weather until the train departs." Independent of this statutory regulation, it is the duty of railroad companies to provide their stations with reasonable appointments for the safety and comfort of passengers; and this includes the obligation to maintain a fire in the waiting room if necessary to make it comfortable. *Hutchinson on Carriers*, § 931; *St. Louis, etc., R. Co. v. Wilson*, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74.

There being no question respecting the duty of the company, both under the statute and the general principles of the law, to keep its waiting rooms in a reasonably safe and comfortable condition for passengers, the only question presented by this record is whether or not appellant discharged this duty. This was altogether a question of fact; and a properly instructed jury, with evidence sufficient to sustain the verdict, has found that the company was negligent in the performance of this duty.

It results that the judgment of the lower court must be affirmed.

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*LYTLE et al. v. GALVESTON, H. & S. A. RY. CO. et al.*

(Supreme Court of Texas, Jan. 23, 1907.)

[99 S. W. Rep. 396.]

**Injunction—Carriers—Sale of Excursion Tickets.\***—A carrier which has determined to sell tickets at a reduced rate for a particular occasion, good for a return trip, but not transferable, and which has so advised the public, and which has placed such tickets on sale, is entitled to an injunction restraining any dealing in the return tickets, but it is not entitled to an injunction enjoining a dealing in such tickets as may thereafter be issued as occasion may arise.

**Monopolies—Carriers—Agreement to Issue Excursion Tickets—Validity.**—An agreement between carriers and associations and citizens of a city, binding the carriers to make special low rates to and from the city for certain occasions and sell nontransferable excursion tickets therefor, does not contravene the state or federal anti-trust laws, the purpose of the carriers in making the tickets nontransferable not being illegal, but to maintain the legal rate as to persons not purchasing excursion tickets.

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\*For the authorities in this series on the subject of ticket scalping and the sale of railroad tickets by unauthorized persons, see footnotes appended to *State v. Thompson* (Ore.), 24 R. R. R. 150, 47 Am. & Eng. R. Cas., N. S., 150, where all the preceding authorities in this series are collected.

*Lytle v. Galveston, etc., Ry. Co*

Certified Questions from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by the Galveston, Harrisonburg & San Antonio Railway Company and others against W. J. Lytle and others. There was a decree for plaintiffs. Questions certified to the Supreme Court by the Court of Civil Appeals. Questions answered.

See 90 S. W. 316.

*W. H. Lipscomb, Walter P. Napier, Wm. Aubrey, and R. B. Minor*, for appellants.

*Frank H. Wash, Wm. H. Burgess, and W. A. Hawkins*, for appellees.

GAINES, C. J. The questions as shown by the following certificate have been referred to us by the Court of Civil Appeals for the Fourth Supreme Judicial District for our determination: "The appellees herein, five railway companies, applied to the district court of the Thirty-Seventh Judicial District of Texas in and for Bexar county for an injunction to perpetually restrain nine men, the appellees, their agents, servants, employees, and representatives from either directly or indirectly having any connection for themselves or in behalf of others, by selling, exchanging, or in any way dealing in, or soliciting the purchase or sale of the right to travel upon any of plaintiffs' lines of railroad, or the return coupon or the unused portion thereof issued by plaintiff railroads, or either of them, or by any other railroad, if for use over plaintiffs' lines of railway, or any part of them, which, by the term thereof, are printed, marked, written, or stamped, or marked in any manner upon any portion thereof "Nontransferable" or equivalent words, or from soliciting, devising, or encouraging, or procuring any person or persons other than the original purchaser or holder thereof to use or attempt to use the same or any part thereof for passage on any train or trains of plaintiff railroads, or either of them, especially nontransferable passes, one way trip passes, and nontransferable passes of every kind and character, all nontransferable advertising contracts of transportation, all nontransferable homeseeker's tickets, tourist tickets, commutation tickets, mileage tickets, San Antonio Carnival, Battle of Flowers or San Jacinto Day tickets, Rough Riders' Reunion tickets, and all other nontransferable tickets, whether sold for any special occasion or not, reading over any of plaintiffs' lines, or either of them, or any part thereof.'

"The substantial allegations are stated as follows, in the brief of appellants and agreed to by appellees: 'That appellees were railway corporations whose lines covered practically the state of Texas, and by connecting lines reached all the railroad stations in the United States, Canada, and Mexico, and transported, and would continue to transport, large numbers of passengers to all points in Texas as well as to foreign countries. That at the request of various associations and various citizens of San Antonio, appellees made special low rates, varying from 1½ to 2 cents per



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mile to and from San Antonio, for the Spring Carnival and other occasions in that city and elsewhere, and purposes to continue to do so in the future. That said special rates were, and would be, evidenced by tickets issued to the original purchasers thereof only and marked, stamped, written, or printed "nontransferable," or some equivalent words, upon some portion of such tickets, and that appellees had issued, and would thereafter frequently issue, annual and trip passes, advertising tickets, or contracts printed in the same mode, and, like many of said tickets, requiring the signatures of the persons to whom the same were originally issued and to be used alone by such persons. That one of the purposes and objects of the original contracting parties, and the effect of the issuance and entering into the contracts, tickets, and other evidences of the right to transportation the selling and dealing in which is sought to be enjoined, are to maintain and affect the regular rate of 3 cents per mile for regular passenger transportation on other character of tickets. That appellants are engaged in, and advertise themselves as, buying, selling, exchanging, and otherwise dealing in railroad tickets, passes, advertising contracts, and all kinds of railroad transportation, including said "nontransferable" tickets, thereby causing persons other than the original purchasers or holders of said tickets, etc., to personate such original purchasers, etc., and use said tickets, etc., for transportation and threaten to continue to do so. That none of appellants are the agents of appellees or hold certificates of authority from them to sell tickets or are authorized to act as appellees' agents in buying, etc., said tickets over appellees' lines. That said defendants have been joined herein because their business transactions complained of are, in fact, purpose, and effect, identical, and, in order to prevent a multiplicity of suits, the relief sought being in behalf of all plaintiffs and against all of said defendants.' It was also alleged that the acts of appellants in the premises, besides being productive of innumerable annoyances and manifold grievances to the traveling public, circumstantially and clearly set forth by the pleader, caused, and would cause, great injury and damage to the business of appellees.

"Appellants answered by general demurrer, which was overruled by the trial court, general denial, and by special pleas, whereby they alleged that the agreements between the appellees and the original purchasers evidenced by the tickets, contracts, etc., the sale of which by appellants was sought to be enjoined, were made in violation of the anti-trust legislation of the state of Texas and of the United States, were, as such, void, and that, in seeking to prevent their sale, etc., by injunction, appellees had not come into court with clean hands, etc.

"A temporary injunction was granted, which was, on final hearing, made perpetual. The decree is as follows: 'That the aforementioned defendants, their agents, servants, and employees be, and the same are, forever enjoined from interfering with plaintiffs' business, by buying, selling, exchanging, or otherwise dealing in any ticket, certificate, advertising contract, or pass, or the return

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portions of any said evidences of a right to transportation over the roads, or any part thereof, of any of the plaintiffs where such tickets, certificate, advertising contract, pass, or any other evidence of the right to transportation either by the terms thereof, is nontransferable, or on which is printed, marked, written, or stamped upon any portion thereof the word "nontransferable," or equivalent words. And this injunction shall apply to all classes of tickets and other evidences of the right to transportation, issued at a reduced rate, already issued, or to be issued in the future, whereon is printed, marked, written or stamped upon any portion thereof the word "nontransferable," or equivalent words, whether specially named herein or not, as well as to the following: "All nontransferable passes of every kind and character, all nontransferable advertising contracts of transportation, or nontransferable homeseekers tickets, mileage tickets, tourist tickets, commutation tickets, or San Antonio Carnival, Battle of Flowers, San Jacinto Day tickets, San Antonio International Fair tickets, Rough Riders' Reunion tickets, Immigrant or Emigrant tickets, tickets to teachers' associations and conventions, Church Conventions of all denominations, Sunday School Conventions of all denominations, Medical Associations and Conventions of all kinds and characters, meetings of all Masonic Orders, all Knights of Pythias, Elks, Woodmen of the World, Odd Fellows, Hoo Hoo or Black Cat, Knights of Columbus, and all meetings of all secret orders of all kinds and characters whether mentioned herein or not, all conventions or Builders Exchange, Federation of Woman's Clubs, Daughters of the Confederacy, Confederate Veterans, tickets to all points where are being held State and County Fairs, Live Stock Associations, Live Stock Shows, Circuses, Saengerfests, all musical and educational conventions, Labor Day Celebrations, Political Conventions, tickets for Winter tourists in Texas, Summer tourists from Texas, Christmas Holidays to Texas, Fourth of July excursions, School Conventions of all kinds and characters, tickets to places where there are theatrical entertainments, Farmers' Congresses, Land Seekers to Texas, Sheriffs' Conventions, County Judges' Conventions, District and County Clerks' Conventions, Real Estate Conventions," provided only that such tickets shall be nontransferable tickets, that is that they shall contain in the body of the ticket, or have marked, printed, written, or stamped on some portion thereof the word "nontransferable" or equivalent words. That all persons whomsoever, whether mentioned herein by name or not, who may have knowledge of this injunction, are likewise enjoined from the transactions mentioned in the preceding paragraph of this decree and shall be bound by them as fully as if mentioned by name herein.'

"The record does not contain a statement of facts.

"Question 1. Was the district court authorized to enjoin the sale of railroad tickets marked 'nontransferable' which were not in existence at the time the decree was rendered, but which might be issued at some time in the future?

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“Question 2. Were the agreements alleged to exist between the railroads and the various associations and citizens of San Antonio in violation of the anti-trust acts of the state of Texas and the United States, or such as would place appellees in a position where they could not invoke the aid of a court of equity in protecting such agreement?”

“Question 3. If the district court had the power and authority to enjoin the sale of tickets, as attempted in the decree, would it have any binding effect on any except the defendants in the suit, their servants, agents, or employees?”

To the first question as broadly propounded, we give an affirmative answer. The answer is, however, subject to an important qualification which will be discussed later on in this opinion. That one who willfully and without legal justification or excuse interferes so as to bring about a breach of a contract between others is guilty of an actionable wrong is no longer a question in this court. *Raymond v. Yarrington*, 96 Tex. 443, 72 S. W. 580, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. Rep. 914; *Brown Hardware Co. v. Indiana Stove Co.*, 96 Tex. 453, 73 S. W. 800. In the case of *Mosher v. Railroad Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249, it was held that the purchaser of a ticket of a character of those in question in this case who failed to identify himself as the original purchaser and to have his ticket stamped for return at the proper office, had no right for passage upon it. This clearly recognizes the validity of such a contract and the binding force of its conditions. It necessarily follows no transferee could acquire such a right, for the reason that it would be impossible for him to comply with the condition by identifying himself as the original purchaser. We see no reason to doubt the correctness of these propositions. Nor do the Court of Civil Appeals seem to have any doubt upon these points, nor upon the further proposition that the purchase and sale of nontransferable tickets which have already been issued may be enjoined. The question submitted by them for our decision is merely whether it is proper for a court to enjoin dealers in railroad tickets from dealing in nontransferable tickets which may be issued in future. The question has of recent years arisen in several cases in the state courts and in the courts of the United States, and it seems to us the great weight of authority supports an affirmative answer.

In *Schuback v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452, the very point was presented, and it was there held, that an injunction would lie to restrain the dealing in nontransferable excursion tickets, which might thereafter be issued. Two of the six justices dissented on that proposition. In the following cases from the federal courts the same doctrine is announced and applied: *Nashville, etc., Ry. Co. v. McConnell* (C. C.) 82 Fed. 65; *Illinois, etc., Ry. Co. v. Caffrey* (C. C.) 128 Fed. 770; *Pennsylvania Co. v. Bay* (C. C.) 138 Fed. 203; and in *Louisville, etc., Ry. Co. v. Bitterman* (C. C. A.) 144 Fed. 34. This last is a decision by the United States Circuit

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Court of Appeals at New Orleans; the other federal cases are decisions by trial courts. As opposed to this line of decisions, we are cited by the able counsel for appellants to but one case which holds a contrary doctrine (*New York Central, etc., R. R. Co. v. Reeves* [Sup.] 85 N. Y. Supp. 28), which we take to be the decision of a trial judge upon a preliminary motion for an injunction.

The jurisdiction of courts of equity grew out of the fact that courts of law were incapable of giving a plain, adequate, and complete remedy in the particular case. Therefore, it would seem the peculiar province of these courts to grant, in cases of the character of that in question, such relief as will afford a complete remedy for the wrongs of which complaint is made. Here we have a case in which the plaintiffs in the prosecution of their business are in the habit of issuing on various occasions, for the accommodation of the public and the increase of their passenger traffic, excursion tickets which provide for the going and return of the original purchaser, but which are expressly made nontransferable. On the other hand, according to the allegations of the petition, which presumably were found to be true, the defendants were engaged in, and advertised themselves as being engaged in, the occupation of dealing in railroad tickets, including the class of tickets in question in this suit. Now, the effect of such dealing is to invite the purchasers from the ticket brokers to attempt to impose upon the railroad companies and to perpetrate a fraud upon them by personating themselves as the original purchasers and entitled to the benefit of the contracts. Now, it is probable that many of the tickets will, by reason of a limitation as to the time of return, be good for a few days only, and to hold that the companies can only enjoin after the tickets are issued would be to deny any effective remedy whatever. Now, the plaintiffs allege in effect, and have presumably proved, that they have been accustomed to issue, and as a part of their business will continue to issue, nontransferable tickets for passage at a reduced rate, and, even if it were possible to enjoin the interference of the contract made by each ticket as it should be issued, it would be contrary to the rules and practice of courts of equity to require separate actions. They will try and determine the right in one action, and, when necessary to avoid a multiplicity of suits, will grant relief by enjoining wrongful acts threatened to be committed, which, if committed, will lead to continuous litigation. It is only when tickets may be issued in future that the injunction acts upon such tickets, and therefore we see no harm that can result to the defendants by enjoining dealing in such tickets, and when it is pleaded and proved that such tickets are on sale and will be issued, we see no reason for holding that dealing in them may not be restrained. Any remedy short of that in the case as shown by the certificate of the Court of Civil Appeals would, we think, be neither adequate nor complete.

It seems to us that, upon the question under discussion, the

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case of *Donovan v. Pennsylvania Company*, 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192, is somewhat in point. In that case the court held, "That the Pennsylvania Company could maintain a suit against hackmen combined together in disregard of its regulations, enjoining them from congregating upon the sidewalk adjacent to its terminal at Chicago so as to interfere with the ingress and egress of passengers." The court there say: "It only remains to inquire as to the competency of a court of equity to give the railroad company the relief it sought. The defendants insist that equity cannot properly interfere. But the inadequacy of a legal remedy in such a case as this one is quite apparent. According to the record the attempt of the defendants, despite the objections of the company, to use its station house and depot grounds for the purpose of meeting passengers and soliciting their patronage, was of constant, daily, almost hourly, occurrence. The case was one of a continuing trespass, involving injury of a permanent nature. A suit at law could only have determined the particular wrong occurring on a particular occasion, and would not reach other wrongs of like character that would occur almost every hour of each day, as passengers arrived at the station of the company. The same state of things existed in reference to such use of the sidewalk in front of the passenger station as unduly interfered with the rights of passengers arriving and departing. Only a court of equity was competent to meet such an unusual emergency, and, by a comprehensive decree, determine finally, and once for all, the entire controversy between the parties, thus avoiding a multiplicity of suits and conserving the public interests. No remedy at law would be so complete or efficacious as a suit in equity in such a case as this one." We think the case before us is one equally strong for equitable relief.

The case of *Board of Trade v. Christie Grain & Stock Co.* (decided by the same court) 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, is more directly in point. The character of the case is shown by the following extracts from the opinion: "The plaintiff was incorporated by special charter of the state of Illinois on February 18, 1859. The charter incorporated an existing board of trade, and there seems to be no reason to doubt, as indeed is alleged by the Christie Grain & Stock Company, that it then managed its Chamber of Commerce substantially as it has since. The main feature of its management is that it maintains an exchange hall for the exclusive use of its members, which now has become one of the great grain and provision markets of the world. Three separate portions of this hall are known respectively as the 'Wheat Pit,' the 'Corn Pit,' and the 'Provision Pit.' In these pits the members make sales and purchases exclusively for future delivery, the members dealing always as principals between themselves, and being bound practically, at least, as principals to those who employ them when they are not acting on their own behalf. The quotation of the prices continuously offered and accepted in these pits during business hours



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are collected at the plaintiff's expense and handed to the telegraph companies, which have their instruments close at hand, and by the latter are sent to a great number of offices. The telegraph companies all receive the quotations under a contract not to furnish them to any bucket shop or place where they are used as a basis for bets or illegal contracts. To that end they agree to submit applications to the Board of Trade for investigation, and to require the applicant, if satisfactory, to make a contract with the telegraph company and the Board of Trade, which, if observed confines the information within a circle of persons all contracting with the Board of Trade. The principal defendants get and publish these quotations in some way not disclosed. It is said not to be proved that they get them wrongfully, even if the plaintiff has the rights which it claims. But, as the defendants do not get them from the telegraph companies authorized to distribute them, have declined to sign the above-mentioned contracts, and deny the plaintiff's rights altogether, it is a reasonable conclusion that they get, and intend to get, their knowledge in a way which is wrongful unless their contention is maintained." It is apparent, as we think, the reports of the quotations which were enjoined were given out daily and hourly, and, it would seem, ceased to be useful in a very short time after they were promulgated. Therefore, as we think, it is apparent, from the nature of the case, that the quotations, the interference with which was enjoined, were not in existence when the suit was brought, but were such as were to be received by the Board of Trade in future. This shows that courts of equity are not, in cases of this character, bound by an inflexible technical rule, but will administer relief commensurate with the threatened injury so as to give a remedy adequate and complete.

The case of *Tyroler v. Warden*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763, so much relied upon in support of the negative of the question, has, in our opinion, no bearing upon it. This is seen by the opinion of the same court in *Collister v. Hayman*, 183 N. Y. 250, 76 N. E. 20, 1 L. R. A. (N. S.) 1188, in which the court say: "*Tyroler v. Warden*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763, relied upon by the appellant, is not analogous. We there adjudged unconstitutional a statute which prohibited as a crime the selling of transportation tickets by any person except common carriers and their specially authorized agents, in so far as it undertook to prohibit citizens of the state from engaging in the business of brokerage in passenger tickets. This case involves, not a statute, but a contract, which excludes no one from carrying on the business of selling theater tickets, but simply prevents a sale thereof on the sidewalk in violation of the express stipulation of the tickets themselves." Besides the decision in the *Tyroler Case* is opposed to the great weight of authority. Indeed, it is said, in effect, by the Supreme Court of Washington in *Re O'Neill* (Wash.) 83 Pac. 104, 3 L. R. A. (N. S.) 558, and by Mr. Freeman in his note to *Jannin v. State*, 96 Am. St. Rep. 829, 830,



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that the decision of the New York Court of Appeals stands alone and is opposed by numerous decisions of other courts of final resort.

But, on the other hand, we think that the principles we have announced are applicable to some tickets to be issued in future, but not to all. When a railroad company has determined upon selling tickets at a reduced rate for a particular occasion good for a return trip but nontransferable, and have so advised the public and placed such tickets upon sale, then, in our opinion, the company has the right to enjoin dealing in the return tickets. In such a case there is a live issue and a threatened injury which is imminent. But, when tickets of the character designated are not upon sale, to enjoin dealing in such as may thereafter be issued as occasions may arise, savors of action appropriate to the legislative branch rather than to the judicial department of the state government. It seems to us that the railroad companies have an adequate and complete remedy by enjoining dealing in tickets which are on the market for sale, without interference as to those that have not been, but may thereafter be, offered for sale. This sufficiently indicates what we think a proper qualification upon an affirmative answer to the first question certified. Some of the authorities cited in support of the main proposition just discussed go further, but we are not content to follow them to their full extent.

2. We understand by the words in the second question certified—"Were the agreements alleged to exist between the railroads and various associations and citizens of San Antonio"—to refer to the allegations of the petition as shown by the following paragraph of the certificate: "That, at the request of various associations and various citizens of San Antonio, appellees made special low rates, varying from 1½ to 2 cents per mile to and from San Antonio, for the Spring Carnival and other occasions in that city and elsewhere, and purposes to continue to do so in the future." The allegation admits of the reasonable inference that the request of the associations and citizens mentioned was acceded to by the plaintiff companies, and this would amount to an agreement. But we see nothing in such an agreement which contravenes the provisions of the "anti-trust laws" either of the state or of the United States. We are pointed to no provision of either our law or of the act of Congress which forbids railroads from issuing nontransferable excursion tickets at a reduced rate for a return passage. From the well-known fact, it had been the custom of railroad companies to issue tickets of the character of those in question for many years, it might well be argued that, if the Legislature of this state or the Congress had desired to prohibit the practice, they would have said so in such terms as would leave no reasonable doubt as to their meaning.

There is no agreement or combination between the companies so as to restrain competition between them as to the reduced rate alleged. That the purpose of the companies in making the tickets nontransferable was to maintain the legal rate of 3 cents

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per mile as to persons who did not purchase the excursion tickets is a purpose sufficiently obvious from the transactions themselves without any allegation to that effect. But that such purpose does not make the transaction illegal seems to us clear from the authorities cited in the discussion of the first question. In *Kinner v. Railway Co.* (Ohio) 69 N. E. 614, the Supreme Court of Ohio held that, even if such tickets were illegally issued, it was no obstacle to granting an injunction in a case like this, and in the case of *Board of Trade v. Stock Company*, *supra*, the Supreme Court of the United States acts upon the same principle. But we do not reach that question and therefore express no opinion upon it.

3. We are of opinion that the determination of the third question is not necessary to the decision of the case. The rights of persons not parties to the action can only be determined in some proceeding to which they are parties. Therefore, we decline to give an answer to the question.

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**CHESAPEAKE & O. RY. CO. v. SAULSBERRY.**

(Court of Appeals of Kentucky, June 18, 1907.)

[103 S. W. Rep. 254.]

**Carriers—Carriage of Goods—Delay in Transportation.**—A delay of a month in the transportation of freight a distance of 33 miles is unreasonable, and the carrier is liable for the damages sustained.

**Same—Remedy of Shipper—Right to Refuse Goods.**—A shipper is not justified because of unreasonable delay in the transportation of his goods to refuse to receive them from the carrier.

**Same—Right of Carrier.**—Where a shipper refuses to receive the goods transported because of delay in the transportation, and the refusal of the carrier to make any concession on account thereof, the carrier has no right to convert the freight to its own use or to dispose of it contrary to law.

**Same.**—Under Ky. St. 1903, § 785, authorizing a carrier having unclaimed freight not perishable in its possession for one year to sell the same at public auction, on giving notice to the consignor and consignee, etc., and to sell perishable freight as soon as it deems a sale necessary, on giving similar notice thereof, and to retain out of the proceeds the expenses of transportation, storage, advertisement, sale, etc., a carrier having in its possession as unclaimed freight corn delivered to it for transportation must, as soon as it is deemed necessary to sell the same, sell it as perishable freight, and give notice thereof, and may, if necessary to sell it at some other place for want of market, transport the same to such place, but the sale must be made in the state, and the carrier taking the freight to another state and there selling it converts it.

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Appeal from Circuit Court, Carter County.  
"To be officially reported."

Action by John M. Saulsberry against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*E. B. Wilhoit and Jno. T. Shelby*, for appellant.  
*Theobald & Theobald*, for appellee.

HOBSON, J. On August 19, 1903, J. M. Saulsberry bought a car load of corn at Marion, Ind., which was shipped to him at Aden, Ky. The first carrier brought the car load of corn to Ashland, and there delivered it to the connecting carrier, the Chesapeake & Ohio Railway Company, about September 1st. Ashland is 33 miles from Aden, but the corn was not brought to Aden until October 2d. In the meantime Saulsberry had made other arrangements for corn at Aden, and had no use for it there, but agreed to take it if the company would deliver it at E. K. Junction, which was eight miles from Aden, and between Aden and Ashland. The company refused to do this. It also refused to make any deduction from the freight on account of the delay in getting the corn to Aden. Saulsberry then declined to pay the freight and take the corn. The corn lay on the side track at Aden until about December 20th, when the company notified Saulsberry that it would sell the corn for its charges. On January 8th the railroad company shipped the corn to Cincinnati, and there sold it for \$240, from which it deducted its freight and charges, \$127.15, leaving \$112.85, which it tendered to Saulsberry. He refused to accept the money, and brought this suit against the railroad company for the conversion of the corn. The jury to whom the case was submitted found a verdict for him for the value of the corn, less the amount of the freight charges. The court entered judgment upon the verdict, and the defendant appeals.

The amount of the verdict is not assailed, but it is insisted that the plaintiff was not entitled to recover. The long delay in getting the car load of corn from Ashland to Aden is accounted for by the defendant by the fact that its yards at Ashland were congested, and that it could not sooner move the car out. Manifestly the delay was unreasonable, and the railroad company was liable to Saulsberry for damages, but this did not give him the right to refuse to receive the corn and throw it upon the hands of the railroad company. But, when he did refuse to receive the corn, the railroad company, after it refused to make any concession to Saulsberry on account of the delay, had no right to convert the corn to its own use or to dispose of it contrary to law. It had a lien on the corn for its freight charges. The rule as to this lien is thus stated in *Hutchinson on Carriers*: "At common law and without some statutory authority, the carrier, as has been seen, cannot sell the goods for his charges upon them. The lien confers no such right. It consist merely in the right to keep

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or detain the goods; and, if the consignee or owner refuse to pay for the carriage and take them, the remedy of the carrier is to have them sold under a judicial order or legal process, to be obtained by a proceeding in equity. A sale without some such authority would be a conversion by the carrier, and he would thereby become liable to whatever damage the owner might sustain by the illegal act, and the purchasers would acquire no title. Where there is a statute authorizing the sale, the sale must be fairly conducted, and held at the time and upon the notice provided by the statute." Hutchinson on Carriers, § 494.

The only statute in this state regulating the subject is section 785, Ky. St. 1903: "Every company that shall have unclaimed freight, not perishable, or unclaimed baggage in its possession, for one year or more, may sell the same at public auction, and out of the proceeds thereof retain the expenses of transportation, storage, advertisement, and sale. Notice of such sale shall be given to the consignor and consignee by letter addressed to each of them, respectively, and mailed to the nearest post-office to the place at which the goods were received, and to which they were carried; and notice of such sale shall also be published for four weeks in some newspaper of general circulation in the state. In case the freight is perishable, it may be sold as soon as it is deemed necessary and proper, and notice of such sale shall be given, if practicable, to the consignor and consignee, as herein directed. A record shall be kept of the articles sold, and the prices obtained therefor, and the surplus, if any, after payment of charges, shall be paid to the owner of such article, if demanded, at any time within two years from date of sale." When Saulsberry declined to receive the corn, it became unclaimed freight, and we think a car load of corn is perishable freight within the meaning of the statute. It was therefore incumbent upon the railroad company, as soon as it was deemed necessary and proper, to make a sale and give notice both to the consignor and consignee, and, as this was practicable, also to publish the notice of the sale for four weeks in some newspaper of general circulation in the state. What the statute evidently contemplates ordinarily is a sale at the place where the freight is. But, if it is necessary to sell it at some other place for want of a market or other reason, still the sale must be made in this state and after notice, as provided in the statute. The statute has no operation outside of the state, and a sale made out of the state or without notice as provided by the statute is void. The act of the company in taking the car load of corn to Cincinnati and there selling it operated as a conversion of the corn. On the whole case we see no error to the prejudice of the substantial rights of appellant.

Judgment affirmed.

## COOK v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, Aug. 15, 1907. On Rehearing, Nov. 28, 1907.)

[59 S. E. Rep. 361.]

**Railroads—Trespassers—Property on Trestle.\***—A railway company is not liable to plaintiff for injury to a dog caused by a train striking it while plaintiff was taking it across the company's trestle, where there was warning against use of the trestle as a footway, and plaintiff supposed those who used it did so at their own risk; and where it does not appear the trainmen saw plaintiff's signals to stop or knew the dog was on the trestle; a railway company not being required to keep a lookout for trespassers on its track.

Gary, J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by W. A. Cook against the Southern Railway Company. From a judgment of the circuit court for plaintiff, on plaintiff's appeal from a magistrate's judgment for defendant, defendant appeals. Reversed. Petition for rehearing dismissed.

*John T. Sloan*, for appellant.

*Porter A. McMaster*, for respondent.

WOODS, J. The plaintiff's action in the court of Magistrate Moorman was to recover of the defendant \$40, the value of a hound, under this allegation: "That on the 31st day of August, 1906, while plaintiff was crossing a trestle, in county above-named, commonly known as Frost's, in the early morning, between the hours of 5 and 6 o'clock, plaintiff was preceded by his hunting dog, a white spotted hound, by name of Traveler, and hearing a train approaching, and seeing the danger to the dog, plaintiff signaled to the engineer with a lantern, and commenced to signal at a distance where the engineer could have seen the danger that this plaintiff was in, but that defendants, its agent and servant, willfully, intentionally, and wantonly, and in utter disregard to plaintiff's property, refused to stop the train, and ran over the dog, dismembering the animal, that had no chance to escape from the trestle." The judgment of the magistrate in favor of the defendant was reversed on appeal, the circuit judge holding "that

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\*For the authorities in this series on the subject of the care due from trainmen to avoid running over dogs, see foot-notes appended to *Fowles v. Seaboard Air Line Ry.* (S. Car.), 20 R. R. R. 510, 43 Am. & Eng. R. Cas., N. S., 510.

For the authorities in this series on the subject of the care due from trainmen to trespassers before their presence on railroad tracks is discovered, see extensive note, 21 R. R. R. 218, 44 Am. & Eng. R. Cas., N. S., 218.

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the overwhelming weight of the evidence shows both negligence and willfulness in running over the dog in question."

There is no evidence whatever that the railroad company assented to the use of its trestle as a footway. On the contrary, the evidence was uncontradicted that there was a warning against such use, and the plaintiff testified that he supposed those who went on it did so at their own risk. The plaintiff's case, then, depends on the claim that he had a right to deliberately take his property on the defendant's railroad trestle, and require the defendant to stop its trains, in order that he might transport his property over the trestle with convenience and safety. To sustain such a claim would be to make the use of its own property by the railroad company subordinate to its unlawful use by a trespasser. The law imposes no duty on the railroad company to keep a lookout for trespassers on its tracks. *Smalley v. Railway Co.*, 57 S. C. 243, 35 S. E. 489; *Jones v. Railway Co.*, 61 S. C. 556, 39 S. E. 758. There was no evidence that the defendant's servants saw the plaintiff's signals or knew that the dog was on the trestle. The difference between a case like this, in which the plaintiff asserts a right of way over the trestle superior to that of the railroad company, and those cases where liability attaches for the destruction of live stock wandering on the railroad, or of a dog seen by trainmen, disabled on the track from accident, is too obvious for discussion.

The judgment of this court is that the judgment of the circuit court be reversed.

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**HANSBERRY v. CHICAGO, B. & Q. RY. CO.**

(Supreme Court of Nebraska, May 24, 1907.)

[112 N. W. Rep. 292.]

**Railroads—Killing Stock—Evidence.\***—Where cattle are being driven over private crossing and are allowed to wander along the right of way of a railroad company, and one of them attempts to cross the track a short distance ahead of an approaching train, the rail-

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\*For the authorities in this series on the subject of the duties of those in charge of trains upon seeing stock near track, see note, 19 Am. & Eng. R. Cas., N. S., 240 (care required of railroad to avoid injuring stock seen near track); *O'Leary v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 141, 39 Am. & Eng. R. Cas., N. S., 141 (degree of care required of trainmen to avoid injuring unattended team, being used in repairing track, when it is seen approaching track); *Alabama G. S. R. Co. v. Hall* (Ala.), 5 R. R. R. 73, 28 Am. & Eng. R. Cas., N. S., 73 (duty of engineer seeing frightened horse running into danger); *Southern Ry. Co. v. Reaves* (Ala.), 20 Am. & Eng. R. Cas., N. S., 784; *Yazoo, etc., R. Co. v. Whittington* (Miss.), 6 Am. & Eng. R. Cas., N. S., 792 (duty of engineer to animals near track); *Central of Ga. Ry. Co. v. Dumas* (Ala.), 23 Am. & Eng. R. Cas., N. S., 956; *Graybill v. Chicago, etc., Ry. Co.* (Iowa), 20 Am. & Eng. R. Cas., N. S., 178.



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road company is not liable for running down and killing such animal, unless it failed to use ordinary care to avoid the accident after discovering the animal on the track.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Appeal from District Court, Franklin County; Adams, Judge.

Action by John T. Hansberry against the Chicago, Burlington & Quincy Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

*W. S. Morlan, Dorsey & McGraw, J. W. Deeweese, and F. E. Bishop*, for appellant.

*A. H. Byrum*, for appellee.

DUFFIE, C. Hansberry is the owner of a tract of pasture land in Franklin county. Defendant's railroad traverses this tract from east to west. For the purpose of affording the plaintiff free access to his land on either side of the track, the railway company, in compliance with the statute of the state, has established and provided a crossing, and maintains gates on each side thereof. July 19, 1906, plaintiff directed his son, a minor 11 years of age, to drive the cattle on the north side of the track to the south side. The boy opened the gates, drove the cattle through the north gate and across the graded roadbed, and then returned to close the north gate. On account of some claimed defect or want of repair in the gate, the boy testifies that it took him about 15 minutes to close and fasten the same. In the meantime the cattle, instead of passing through the south gate, had meandered along the defendant's right of way. About this time one of defendant's passenger trains approached from the west at a high rate of speed, being from one to two hours behind its schedule time. The train struck and killed one of the plaintiff's cows which was crossing its track at the time, and this action was brought to recover its value. From a judgment in favor of the plaintiff, the defendant has appealed.

The negligence charged against the defendant is "that its employees saw said animal on said track in ample and sufficient time to have avoided, and could have avoided the killing of said animal, but that, notwithstanding this fact, the said defendant, its agents, and employees, knowingly, negligently, willfully, and on purpose, ran its locomotive and cars upon and over said animal, killing the same to the plaintiff's damage in the sum of \$30." The only witnesses having personal knowledge of the circumstances of the killing were plaintiff's son and the engineer in charge of the train. The engineer relates the circumstances as follows: "Well, sir, it is about two miles east of Naponee, and a curve is 'about a mile east of Naponee, and after we got around that curve I noticed a boy on a horse. I seen his back was to me, and I whistled the crossing whistle, and the boy looked around and saw me, and turned his horse around and whipped to the south. The south gate was open, and there was a cow standing on the south side

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of the track, about two rails east of the crossing, and I didn't see these other cattle until I got up. There was four, five, six, or maybe a dozen on the north side, probably two rails east of the crossing, and the north gate was shut. This boy put the spur to the horse, or whip, and went south. The roadmaster was on the left side, and when I got up close to the cow, probably 150 or 200 yards, she turned her head, and I thought she was inside the fence, but saw she wasn't, and just then she turned and started to cross the track ahead of the train, and I applied the emergency air, and the train slowed down to about 15 miles an hour, and struck the cow, and I released the air and went on." He further stated that there was nothing else that could be done except to apply the emergency air, and that by all his skill as an engineer he could not have prevented striking the animal. The boy in charge of the animals testifies that the cow went on the track "when they got pretty near to her." He further testified that the train slowed up, and when asked how much, he answered, "Oh! pretty slow."

In *U. P. Ry. Co. v. Mertes*, 39 Neb. 453, 58 N. W. 106, we said: "The Union Pacific Company's employees having sounded the whistle, rung the bell, and shut off steam, so as to decrease speed, as soon as they discovered that Mr. Mertes, apparently intoxicated, was walking along the side of the track upon which they were running their engine, and afterwards, when he actually stepped upon this track, having, as we have seen, used every available means to stop the engine as quickly as that result could be accomplished, nothing more could be required at their hands." In *C., B. & Q. Ry. Co. v. Lilley*, 93 N. W. 1012, 4 Neb. (Unof.) 286, we said: "Ordinarily an engineer has a right to presume that persons walking along the track are in possession of their sense, and will appreciate the danger and act with discretion, and he is under no obligation to stop the train, or even lessen the speed thereof, before discovering that such person is heedless of warnings given of the approach of the train, or otherwise in imminent peril." That the rule of these opinions is right and just is not a matter for dispute, and with much more force should it be applied in case of an animal grazing along the right of way of a railroad company, but not actually upon the track when first seen. In *Yazoo & M. U. Ry. Co. v. Wright*, 78 Miss. 125, 28 South. 806, it was said: "An engineer need not stop his train or check his speed because animals appear on the side of the track, and, under such circumstances, to blow his whistle will often cause the very disaster sought to be avoided." In *Cumings v. G. N. Ry. Co.*, 108 N. W. 798, the Supreme Court of North Dakota, under circumstances very similar to those in the case at bar, reversed a judgment in favor of the plaintiff and ordered the case dismissed. If we accept as true the undisputed evidence offered in this case, it conclusively appears that the cow for which damage is claimed attempted to cross defendant's track ahead of the approaching train, and at so short a distance that it was impossible to avoid striking her. The whistle was blown, the bell was rung, the

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emergency air was applied, and every means adopted to avoid the injury. The plaintiff's own evidence tends strongly to prove that the defendant and its employees were wholly without fault. The district court should have directed a verdict for the defendant.

We recommend a reversal of the judgment.

EPPERSON and GOODE, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded.

**COE v. NORTHERN PAC. RY. CO.**

(Supreme Court of Minnesota, April 19, 1907.)

[111 N. W. Rep. 651.]

**Railroads—Injury to Stock—Fences.**—The liability of a railroad company for failure to maintain its right of way fence in good repair is measured by the rules of ordinary care and prudence.

**Same.**—The obligation to construct the fence as required by statute is absolute; but, when once constructed in compliance with law, the company is only bound to the exercise of reasonable care in maintaining it.

**Same—Evidence.**—Evidence held to support the verdict.

(Syllabus by the Court.)

Appeal from District Court, Morrison County; D. B. Searle and Homer B. Dibell, Judges.

Action by M. E. Coe against the Northern Pacific Railway Company. From an order denying the motion for judgment notwithstanding the verdict or for a new trial, defendant appeals. Affirmed.

*L. T. Chamberlain* and *C. A. Hart*, for appellant.

*Elmer A. Kling*, for respondent.

BROWN, J. Action to recover the value of two cows, alleged to have been killed by one of defendant's trains as a result of its negligence in failing to maintain a good and sufficient right of way fence, by reason of which the cows strayed upon the right of way. Plaintiff had a verdict in the court below, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

The only assignment of error requiring special mention is that which challenges the correctness of the charge to the jury on the subject of defendant's duty to maintain in good repair its right of way fence. It is urged that the court charged the jury, in effect, that the obligation of maintenance was an absolute one, a failure to perform which rendered defendant liable, without regard to whether it exercised reasonable care in the matter of inspection and repair or not. If this were the proper construction

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to be given the charge, it incorrectly stated the law to the jury. The statute requiring railroads to fence their rights of way creates an absolute duty to comply therewith so far as concerns the construction of the fence. *Nickolson v. Railway Co.*, 80 Minn. 508, 83 N. W. 454; *Ellington v. Railway Co.*, 96 Minn. 176, 104 N. W. 827. But the unconditional obligation thus imposed does not extend to the repair of the fence when once constructed as required by law. The company in this respect is held only to the rule of ordinary care and prudence. It is bound to maintain the fence in good repair, but its liability for want of repair is governed by the ordinary rules of negligence. *Varco v. Railway Co.*, 30 Minn. 18, 13 N. W. 921. This particular feature of the law was not specifically referred to in the instructions to which exception is now taken, but it is clear that the court did not intend by the language used to inform the jury that the liability for failure to repair was absolute. The charge simply advised them that if the fence was out of repair, and plaintiff's cows passed through it, at the point where so out of repair, onto the right of way, defendant was liable. This was, abstractly, a correct statement of the law. It was incomplete, and should have been followed by appropriate reference to the rule of negligence upon which the right of recovery depended. But no exceptions were taken to the charge at the trial, or requests made for more specific directions upon the subject, and defendant is in no position to complain that the jury were not fully instructed upon the point. The rule of *Steinbauer v. Stone*, 85 Minn. 274, 88 N. W. 754, applies. *Turritin v. Railway Co.*, 95 Minn. 408, 104 N. W. 225; *Ellington v. Railway Co.*, 92 Minn. 470, 100 N. W. 218. The particular question was fully covered by the evidence, and no claim was made on the trial, so far as the record discloses, that the rule of ordinary care did not apply.

The other assignments of error do not call for discussion. The defendant did not request that the question of contributory negligence be submitted to the jury, and the assignment presenting this point is not well taken. *Ellington v. Railway Co.*, 92 Minn. 470, 100 N. W. 218. Our examination of the record leads to the conclusion that the verdict is sustained by the evidence.

Order affirmed.

SOUTHERN RY. CO. IN KENTUCKY *v.* WINCHESTER'S EX'X.

(Court of Appeals of Kentucky, Nov. 15, 1907.)

[105 S. W. Rep. 167.]

**Railroads—Accident at Street Crossing—Sufficiency of Warning—Question for Jury.**—In an action against a railway company for the death of a pedestrian at a street crossing, held, under the evidence, a question for the jury whether adequate notice of the approach of the train was given.

**Same—Evidence—Admissibility.\***—In an action against a railway company for the death of a pedestrian at a street crossing, alleged to have resulted from a negligent failure to give warning of the approach of a train, it may not be shown that warning was not given on previous occasions.

**Same—Duty at Crossings.**—A railway company is liable for injuries resulting from its failure to have its train under reasonable control in approaching a street crossing, to keep reasonable lookout for persons using the crossing, to give timely notice of the train's approach by ringing the engine's bell, to have the headlight burning, or to exercise ordinary care to prevent injury to persons using the crossing.

**Same.†**—Where a street crossing over railroad tracks is used by many persons, and is more than ordinarily dangerous to such persons, the company, in addition to the usual signals, must provide such signals as are reasonably necessary to give notice of a train's approach to the crossing.

**Same—Instructions—Care Required of Pedestrian.**—In an action against a railway company for the death of a pedestrian at a street crossing, an instruction that if, in approaching the crossing, he failed to exercise ordinary care for his own safety, and such failure contributed to his injury, and he would not have been injured except for his own negligence, plaintiff could not recover, was erroneous for not defining the pedestrian's duty.

**Same—Pedestrian's Duty.‡**—It is the duty of a pedestrian in approaching a railroad crossing to use such care as may be usually

\*See extensive note, 19 R. R. R. 275, 42 Am. & Eng. R. Cas., N. S., 275.

†For the authorities in this series on the question whether statutory requirements are the sole measure of a railroad company's duties with respect to giving crossing signals, see foot-notes appended to *Bamberg v. Atlantic Coast Line R. Co.* (S. Car.), 22 R. R. R. 20, 45 Am. & Eng. R. Cas., N. S., 20; *Louisville & N. R. Co. v. Lucas' Adm'r* (Ky.), 22 R. R. R. 739, 45 Am. & Eng. R. Cas., N. S., 739.

‡For the authorities in this series on the question of the care required of a highway traveler to discover approaching trains before attempting to cross railroad tracks, see foot-notes appended to *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56; foot-notes appended to *Louisville & N. R. Co. v. Lucas' Adm'r* (Ky.), 22 R. R. R. 739, 45 Am. & Eng. R.

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expected of an ordinarily prudent person to learn of approach of trains and keep out of their way, and, if the crossing is especially dangerous, he must exercise increased care commensurate with the danger; and if his failure to do so causes him injury he cannot recover, though the company is negligent in not keeping its train under reasonable control in approaching the crossing, in not keeping a reasonable lookout and in giving inadequate warning.

Nunn, J., dissenting.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action for negligent death by Clark A. Winchester's executrix against the Southern Railway Company in Kentucky. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

*Humphreys & Humphreys, L. R. Yeaman, and Chas. G. Middleton*, for appellant.

*Chas. H. Shields and O'Neal & O'Neal*, for appellee.

HOBSON, J. On November 29, 1905, about 5:40 a m., Clark A. Winchester was struck by an out-going train of the Southern Railway Company in Kentucky on the Hemlock Street crossing in Louisville, Ky., and instantly killed. This action was brought by his executrix to recover for his death, and, judgment having been entered in favor of the plaintiff against the railway company, it appeals.

It is charged in the petition that the Hemlock Street crossing was unusually dangerous; that it was much used; that the train that struck Winchester was running at a too rapid rate of speed; that there was no warning or notice of its approach to the crossing; that those in charge of the train did not have it under proper control and were not keeping a lookout; that there was no flagman, watchman, or gate at the crossing, as there should have been, as the crossing was in a thickly settled part of the city and was much used. By its answer the defendant controverted the allegations of the petition and pleaded affirmatively that the decedent lost his life by reason of his contributory negligence. This was controverted by the reply, which made up the issue.

The proof on the trial showed that the railroad crossing at Hemlock street was on a sharp curve, and that the right of way at this point was very narrow. One witness says it was only about

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Cas., N. S., 739; foot-notes appended to *Bamberg v. Atlantic Coast Line R. Co.* (S. Car.), 22 R. R. R. 20, 45 Am. & Eng. R. Cas., N. S., 20; foot-notes appended to *Norris v. New York, etc., R. Co.* (Conn.), 22 R. R. R. 17, 45 Am. & Eng. R. Cas., N. S., 17.

For the authorities in this series on the subject of the combined effect of negligence and contributory negligence in actions for injuries sustained at railroad crossings, see foot-notes appended to *Baker v. Tacoma Eastern Ry. Co.* (Wash.), 22 R. R. R. 723, 45 Am. & Eng. R. Cas., N. S., 723.



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20 feet wide. Winchester was approaching the crossing from the south, and as he came along the sidewalk a high fence shut off all the view until he got within a few feet of the track. When he came from behind the fence and got upon the right of way, by reason of the sharpness of the curve he could not be seen by either of the men on the engine. The engineer testified that his view was cut off by the boiler, and the front brakeman, who was watching on the other side of the cab, did not see Winchester until after he was struck by the train, in consequence of the curve. One witness who was getting a bucket of water on the corner lot, only a few feet from the crossing, testified that as the train passed her no bell was ringing, and the plaintiff introduced other witnesses tending to confirm the testimony of this witness. By an ordinance of the city of Louisville the whistle is not allowed to be blown in the city limits, except in cases of emergency.

The proof for the defendant showed that it had on the engine a bell which rang automatically; that this bell was started when they left the yards, and was ringing when they approached the crossing. The train was a heavily laden freight running eight or ten miles an hour upgrade, and the exhaust made considerable noise. There was no gate or watchman at the crossing. There was a gate at the Catalpa street crossing, one square away, and also a gate at the Woodland Avenue crossing one square away in the opposite direction. At the Hemlock Street crossing there was a bell at the top of a pole. The bell was about the size of an engine bell, and had an arm to it from which a wire ran to the Catalpa Street crossing and another to the Woodland Avenue crossing. When a train was approaching the watchman in the tower at Catalpa street would ring the bell by pulling the wire if the train was coming from that direction; and if it was coming from the other direction the watchman at Woodland avenue pulled the wire and rang the bell. The defendant showed by these watchmen that the bell was ringing at the time the train in question approached. The defendant also proved by a witness who was coming along Hemlock street, approaching the crossing, some distance behind Winchester, that he heard the train coming and also heard a bell ringing.

It is insisted for the defendant that on this proof the court should have instructed the jury peremptorily to find for the defendant, and that under all the evidence no judgment against it should be permitted to stand. We cannot concur in this view. If the plaintiff's proof was true, neither of the bells was ringing; and, while the weight of the evidence would perhaps show that the engine bell was ringing, it would by no means follow from this that adequate notice of the approach of the train was given. It is well known that light and sound travel in straight lines. From the sharpness of the curve, the light from the headlight of the engine would not be thrown upon the crossing until the engine was practically at it; and the headlight would therefore not give the traveler who was near the crossing warning of the approach of the train. As sound also travels in a straight line, this might

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reach a man who was back from the crossing some distance, where it would not reach a person who was near the crossing, as Winchester was, and he would have no notice of the approach of the train, unless he might see it, and this he could not do until he was practically on the track. Under the evidence of the defendant this train was running over the crossing without any lookout; for neither of the men in the cab who were looking out saw Winchester, or could see a man after he would come in view at the crossing. This was in a thickly settled part of the city. There was much traveling over the crossing, and, in view of the proof, it was a question for the jury, whether adequate notice of the approach of the train was given. Persons approaching the crossing would naturally look to the bell on the pole, and, if this bell was not ringing, presume that the crossing was safe; for the bell was put there to notify the public of the approach of the train, and, if it was not rung when this train approached, it was misleading. In thickly settled communities the railroad company must give adequate notice of the approach of its trains, and must keep a reasonable lookout; and where, as here, the ordinary means of giving notice and the ordinary lookout would be insufficient, other precautions must be provided.

The plaintiff introduced W. A. Thomas, and he was allowed to state as follows, over the defendant's objection: "Q. Prior to the accident I will ask you if it would always ring when the wires were pulled. By the Court: Do you remember this occasion? A. I was not present at the time this happened. Q. State how the bell would act there before the accident. A. I have frequently noticed that bell to shake, and not to ring." I also introduced Earnest Guthrie, and he was allowed to state as follows, over the defendant's objections: "Q. I will ask you to state if you had noticed that bell before Mr. Winchester was killed, when trains were approaching and when the tower man was trying to operate it, whether it would ring. (Objected to by counsel. Objection overruled, to which the defendant by counsel excepted.) Q. Tell the jury what you have noticed about that. A. Sometimes it would ring and sometimes it would not. Sometimes you would see the post vibrate, and the bell would attempt to ring, but could not do it on account of various causes. Sometimes the wind would twist the wire, and that would cause them to work with friction, and the friction was so great that the bell would not ring, and other times the wire would be broken and the wire would not work. The tapper would be held on one side, and the pole would shake, but there would be no sound. Q. Before the accident did that occur often or seldom? A. It occurred frequently." Matthew L. Blair and George W. Grant, who were also introduced by the plaintiff, were allowed to give similar testimony over the defendant's objection. The objection to this testimony should have been sustained. The question was whether adequate notice of the approach of the train in question was given. If proper notice of the approach of the train was given, it was immaterial that proper notice was not given of the ap-

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proach of some previous train. The fact that the bell would sometimes ring on previous occasions, and sometimes would not ring, when the watchman pulled the wire, is no evidence that it did not ring at the time in question. If the watchman on other occasions was negligent, this fact cannot be proved to show that he was negligent on this occasion. The question the jury are to try is simply whether proper notice of the approach of this train was given; and, if the bell was in fact ringing as this train approached, the defendant discharged its duty in that regard. The proof that the bell frequently did not ring did not tend to show that it did not ring on this occasion; for it is evident from the proof that the bell frequently did ring, and so the evidence, as far as the ringing of the bell goes, would tend as much to show that the bell was ringing at the time in question as that it was not ringing. The only effect of the evidence was to get into the case proof that on other occasions the defendant had been guilty of negligence in not giving proper notice of the approach of its trains. It is well settled that this cannot be done.

The court at the conclusion of the testimony gave the jury these instructions: "(1) The court instructs the jury that it was the duty of the defendant's employees in charge of the train which struck Clark A. Winchester at the time and place mentioned in the petition to have the engine under reasonable control when it approached the crossing at Hemlock street, to keep a lookout ahead for the persons who were using the crossing, to give timely notice of the approach of the train by ringing the bell of the engine, to have the headlight burning, and to exercise ordinary care to prevent injury to persons using the crossing; and if the jury shall believe from the evidence that the said employees failed to perform any of these duties, and that by reason thereof the said Clark Winchester was struck by the engine and killed, then the law is for the plaintiff, and they should so find, unless they shall further believe from the evidence that the said Winchester was negligent, and thereby helped to cause or bring about his injuries, and that he would not have been injured but for his contributory negligence, if any there was. (2) The court instructs the jury that if they shall believe from the evidence that the crossing at Hemlock street was used by many persons, and that it was more than ordinarily dangerous to persons using it, then it was the duty of the defendant, running its trains over the said crossing, in addition to the usual and ordinary signals, to provide such signals as were reasonably necessary to give notice of the train's approach to the crossing; and if it failed to provide such signals as were reasonably necessary at that crossing, and by reason of such failure the said Winchester received the injuries complained of, and he did not help to cause or bring about his injuries by negligence on his part, but for which he would not have been injured, then the law is for the plaintiff, and they should so find. (3) It was the duty of the said Winchester, when he approached the said crossing, to exercise ordinary care for his own safety; and if he failed to exercise that degree of care for his own protection, and

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by reason of such failure he helped to cause or bring about his injuries, and he would not have been injured but for his contributory negligence in that respect, if any there was, then the law is for the defendant, and so the jury should find, even though they may believe from the evidence that the defendant or its employees failed to discharge the duties incumbent upon them."

We see no objection to instructions 1 and 2; but the third instruction is defective, in that it does not define the duties of the decedent in using the crossing. In *L. & N. R. R. v. Cummins' Administrator*, 111 Ky. 338, 63 S. W. 595, we thus laid down the rule: "In using the railroad and the street crossing, both parties were required to exercise the same degree of care. It was incumbent on appellant to give such notice of the approach of the train to the crossing, to run the train at such speed, keep such lookout, and use such care to avoid injury to persons thereon as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances. It was incumbent on the intestate to use such care as might usually be expected of an ordinarily prudent person, situated as he was, to learn of the approach of the train and keep out of its way. If the crossing was especially dangerous, it was incumbent on both parties to exercise increased care commensurate with danger." In lieu of the third instruction on another trial, the court will tell the jury that it was the duty of the intestate, on approaching the crossing, to use such care as may be usually expected of an ordinarily prudent person to learn of the approach of the train and keep out of its way; that, if the crossing was especially dangerous, it was incumbent on him to exercise increased care commensurate with the danger; and that if he failed to exercise such care and but for this would not have been injured, then the law is for the defendant, and the jury should so find, even though they may believe from the evidence that the defendant or its employees were negligent as set out in No. 1 and No. 2.

The other matters complained of will perhaps not occur on another trial.

Judgment reversed, and the cause remanded for further proceedings consistent herewith.

NUNN, J., dissents on the question of the incompetency of the evidence referred to.

ST. LOUIS & S. F. RY. CO. *v.* FERRELL.

(Supreme Court of Arkansas, Nov. 4, 1907.)

[105 S. W. Rep. 263.]

**Railroads—Death of One Crossing Track—Speed of Train.\***—It is immaterial as to a railway company's liability for the death of one stumbling and falling on a track while attempting to cross in front of a moving train that the train was running at a negligently high rate of speed, that not being the proximate cause of the accident, and it not appearing that the result would have been different had the train been running more slowly.

**Same—Failure to Give Signals.†**—Liability of a railway company for the death of one stumbling and falling on a track while attempting to cross in front of a moving train cannot be based on a failure to give signals of the train's approach, where he knew the train was coming.

**Same—Lookout—Inference of Negligence.**—Where one was killed while attempting to cross a track in front of a moving train, it cannot be inferred that the enginemen kept no lookout because failing to stop the train or give signals, where, a few moments before the accident, decedent was walking along a parallel track in perfect safety, and attempted to cross the other track so shortly before the train struck him that the accident could not have been averted.

**Same—Stakes Along Track.**—Since the public in using a railroad track as a public way assumes the risks incident to its use as a track, liability of a railway company for the death of a prospective passenger stumbling over a grade stake and falling on a track while attempting to cross in front of a moving train cannot be based upon the presence of the stake, which was being used in the proper construction and maintenance of the road.

**Same—Contributory Negligence.‡**—A person who, on his way to a

\*For the authorities in this series on the subject of the combined effect of contributory negligence of highway traveler and negligence with respect to the speed of train or street car at crossing, see foot-notes appended to *Illinois Cent. R. Co. v. Ackerman* (C. C. A.), 21 R. R. R. 76, 44 Am. & Eng. R. Cas., N. S., 76.

†For the authorities in this series on the question whether it is actionable negligence to fail to give crossing signals where the person struck by the train or street car knew of its approach in time to have avoided the collision see foot-notes appended to *Hutchinson v. Missouri Pac. Ry. Co.* (Mo.), 22 R. R. R. 683, 45 Am. & Eng. R. Cas., N. S., 683; foot-notes appended to *Illinois Cent. R. Co. v. Willis' Adm'r* (Ky.), 22 R. R. R. 312, 45 Am. & Eng. R. Cas., N. S., 312.

‡For the authorities in this series on the subject of contributory negligence in attempting to cross railroad tracks in front of a train or street car which was seen, or should have been seen, by the highway traveler before he made such attempt, see foot-notes appended to *Duggan v. Boston & M. R. R.* (N. H.), 24 R. R. R. 797, 47 Am. & Eng. R. Cas., N. S., 797; foot-notes appended to *O'Brien v. St. Paul City Ry. Co.* (Minn.), 23 R. R. R. 323, 46 Am. & Eng. R. Cas., N. S., 323.

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railroad depot, in attempting to cross the track in front of a moving train, stumbles over a grade stake and falls on the track and is killed by the train, where he knew the train was coming, and left a good and safe place for walking, is chargeable with contributory negligence, which will defeat a recovery for his death.

Appeal from Circuit Court, Mississippi County; Frank Smith, Judge.

Action for death by Rowena Ferrell, administratrix, against the St. Louis & San Francisco Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Rowena Ferrell, as administratrix of the estate of her deceased husband, Lou. M. Ferrell, brought this action against the St. Louis & San Francisco Railway Company for damages for the alleged negligent killing of said Ferrell by a train of the appellant company, and recovered a verdict of \$4,000 for the benefit of his widow and children. Judgment was rendered thereon, and the defendant company has appealed.

The case is refreshingly free from conflicting evidence. The testimony as to the death of Mr. Ferrell comes from disinterested witnesses, who were his companions at the time. Taking that testimony most strongly in favor of the plaintiff, the following facts appear: Osceola is divided into two sections, known as "Old Town" and "New Town." Hale avenue connects the two sections. The two leading hotels of the town are situated on Hale avenue, one on the east and one on the west of the railroad tracks, which cross Hale avenue at right angles. There were two tracks leading from Hale avenue to the depot, the main track, and on the west thereof a passing track, and further south a house or commercial track joined the main track on the east side and ran on south of the station. Where this accident occurred there were the three tracks, which will be referred to as the "main line," "west track," and "east track." The main line was raised about 12 inches above the east and west tracks, and, in order to do this work, grade stakes were driven 100 feet apart on each side of the main track. They were left there for the purpose of bringing the level of the main line to the grade as indicated by these stakes, and the work was still being done for that purpose by the section hands, not by the regular construction gang, which had left there before this time. It was essential that the stakes remain until the track had become settled to the required elevation, in order that the section hands might properly do the work; and they were reset when it became necessary, and when they were knocked down they were replaced. These stakes were about 1 inch thick, about 2 inches wide, and at this point about 12 inches above the level of the ground, reaching to the level of the top rail, and were set about 12 inches from the ends of the ties. In the spring of 1904 the station at Osceola was moved to a point in a field about 1,500 feet south of Hale avenue, and on the east side of the main line. From that time until the time of the death of Mr. Ferrell, in December, the railroad tracks from Hale avenue to



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the depot had been constantly used by the public, particularly the traveling public, especially those stopping at the hotels. This was due to several reasons. No good street or walk way had been built to the depot, and the railroad tracks were a little raised above the surrounding country, and were covered with sand, making a much better walk than any other route. It may be assumed that the use of these tracks from Hale avenue to the depot was so common and well known to the railroad company that the public was impliedly licensed to use that route at the time that Mr. Ferrell and his companion were using it. Messrs. Ferrell, Bell, Merrell, Noonan, and Speck were attending court at Osceola, and desired to go to their homes south of there, and went to take the train which passed through Osceola going south about 7 o'clock the night of December 10, 1904. They started from their hotel to walk to the station by way of the tracks. Messrs. Merrell, Speck, and Noonan were in advance of the main line, and Messrs. Bell and Ferrell were walking together, on the west track. These gentlemen were walking leisurely and engaged in conversation. They thought they were in ample time for their train. When they were about a third of the way from Hale avenue to the station, they heard a train coming, which they supposed to be the passenger, but which proved to be a through freight, which did not stop at Osceola. It was going at a speed variously estimated from 25 to 40 miles an hour. In order to catch their train, they commenced running, hoping to reach the station before the train would leave there. The three gentlemen in front turned from the main track to the west track, and ran for some distance until the train passed them. None of them saw the accident. Messrs. Bell and Ferrell ran for some distance along the west track where they had been walking. Mr. Bell outran Mr. Ferrell, but was only a short distance ahead of him. Mr. Bell thought that they had better get on the east side, as that was the side the station was on. He crossed over from the west track to the east track, crossing the main line diagonally as he ran. He called to Mr. Ferrell to come across to that side. He continued to run a short distance, and then, hearing the roaring of the train behind him, he turned to look, and just as he did so saw Mr. Ferrell with outstretched arms falling before the train. Mr. Ferrell had evidently stumbled on one of the grading stakes, as was demonstrated by examination next day. Mr. Bell could not tell whether the train struck Mr. Ferrell before he fell to the ground or not. The glare from the headlight just enabled him to catch a glimpse of Mr. Ferrell in the act of falling with outstretched arms, in a position as if having stumbled over some obstruction.

*L. F. Parker, W. F. Evans, and W. J. Orr, for appellant.*

*J. T. Costom and Murphy, Coleman & Lewis, for appellee.*

HILL, C. J. (after stating the facts as above). The complaint in this case is predicated upon the following charges of negligence: First, that the train was running through the corporate

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limits of Osceola at an extraordinary and unusual rate of speed; second, that those in charge of the train did not give signals by sounding the whistle or ringing the bell to apprise deceased of the approach of the train; third, that the train operatives were not keeping a constant lookout as required by law for persons and property upon the tracks; fourth, the presence of the stake upon which Mr. Ferrell stumbled.

1. The rate of speed was shown to be from 25 to 40 miles an hour, as variously estimated. There was no evidence that this was contrary to municipal law of the town of Osceola; but, if it be conceded that it was negligent to run the train at this rate of speed at this place where the public was accustomed to walk, that would not help plaintiff's case, for such rate of speed was not the proximate cause of the death of Mr. Ferrell. Had this train been running 4 miles an hour, instead of 40, the result would have been the same if the other facts in evidence had been present; and there is nothing to indicate that the other facts would not have been present had the rate of speed been moderated.

2. The evidence establishes that the usual signals for the station and crossing were given. One of the witnesses says he did not hear them. There were no special signals given on account of the presence of these gentlemen on the tracks. The object of signals is to notify people of the coming of the train. Where they have that knowledge otherwise, signals cease to be factors.

3. There is no evidence of a failure to keep a lookout. The plaintiff relied upon deductions from the train failing to stop or give special signals to these gentlemen on the track. But there is nothing in the evidence to warrant such deductions. If a lookout was being kept, the engineer and fireman would have seen a party of gentlemen running down the west track. They were in perfect safety, and it is evident from the testimony of Mr. Bell that the time when he crossed the main line and the time when Mr. Ferrell attempted to cross it was so shortly before the passage of the train that nothing could have been done in the way of checking or stopping it. A careful watch, or a failure to watch, could not have influenced the result.

4. No negligence of the company could be predicated upon the presence of the stake between the tracks. The stakes were as rightfully there as the ties. They were being used for the proper construction and maintenance of the road. Had Mr. Ferrell stumbled over the end of a tie, there would have been just as much room to argue that it was negligence to have an exposed tie where the public walked. The public which made use of the railroad track as a public way assumed the risks incident to its use as a railroad track. Mr. Justice Riddick in the case of *Perdue v. Railway Company*, 100 S. W. 901, said for the court: "The law exacts of the railway companies whose tracks are laid along or across public streets that they shall use reasonable care and diligence in constructing and maintaining such tracks, so that the public, which has also the right to use the streets, may not be injured. But, while they are responsible for injuries to

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travelers caused by their negligence, they are not insurers of the safety of travelers, and are not bound to provide against everything that may happen on the highway, but only for such things as ordinarily exist or such as may reasonably be expected to occur." This principle excludes the imputation of negligence against the company for permitting the stake to be between the tracks, because stumbling over it was only one of the things which may happen on a highway, not one which would be reasonably expected to occur. The above statement of the principle is more favorable to the plaintiff than she was entitled to in this case, as the place of injury was not a public road, but merely a railroad track which the public was for the time being licensed to use for its convenience.

5. But, even if the railroad company was guilty of negligence in any of the particulars charged, yet the contributory negligence of Mr. Ferrell would defeat the action. He was 12 inches from the ends of the cross-ties when he stumbled and fell in front of the moving train. He knew the train was coming. He had a good and safe place to travel on the west track; but for some reason he left that route and was either running too near the main track for safety, or else, which is more probable, he was trying to follow his companion across to the east side, on which the depot was located. He would probably have safely crossed as his companion did had it not been that he unfortunately stumbled and met his death. This is a stronger case of contributory negligence than was before the court in *Burns v. Railroad*, 76 Ark. 10, 88 S. W. 824, in which the court declared the facts therein as a matter of law showed contributory negligence. The circuit court erred in submitting the case to the jury.

Reversed and remanded.

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**WESTERKAMP v. CHICAGO, B. & Q. RY. CO.**

(Supreme Court of Colorado, Nov. 4, 1907.)

[92 Pac. Rep. 687.]

**Railroads—Crossing Accident—Contributory Negligence.\***—Plaintiff, with knowledge that a train was about due, approached a railroad crossing, in an inclosed milk wagon before daylight. He testified that, when 190 feet from the track, he commenced looking toward the east and when within 50 or 60 feet he stopped, looked, and listened, but neither heard nor saw a train, though he noticed the switch and other lights between one-quarter and one-half mile east of the crossing, that he continued to look and listen, but saw no train until just as his horses started to cross the track, when the headlight of the locomotive approaching from the east flashed on him, and he was struck. The railroad was on a fill, and the crossing

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\*See preceding case, and foot-notes.

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was but a short distance west of a bridge over a river. From a point 25 feet before reaching the track, plaintiff's view was unobstructed for an indefinite distance toward the east, and a witness who was in advance of plaintiff between 100 and 200 feet noticed the train approaching as he crossed the track when it was then between a quarter and a half mile away. Held that, as plaintiff must have seen the train if he had looked as he testified, he was negligent as a matter of law, and could not recover.

**Same—Ordinances—Reliance.**—Where, in an action for injuries to plaintiff at a railroad crossing, plaintiff testified that he did not see the train which collided with his wagon, he cannot be heard to claim that in passing over the crossing ahead of the train he relied on a city ordinance prohibiting the operation of trains within the city where the accident occurred at more than six miles per hour.

Error to District Court, City and County of Denver; John I. Mullins, Judge.

Action by August Westerkamp against the Chicago, Burlington & Quincy Railway Company. From a judgment for defendant, plaintiff brings error. Affirmed.

Plaintiff in error brought an action to recover damages for injuries sustained by a train of defendant in error colliding with a wagon he was driving. The trial court, at the conclusion of the testimony of plaintiff, directed a verdict for the defendant, upon the ground that it established that the contributory negligence of plaintiff was the proximate cause of his injury. Plaintiff brings the cause here for review on error. His counsel contend that the testimony establishes that the defendant was negligent, and that plaintiff was not guilty of contributory negligence, or that the latter question should have been submitted to the jury. The testimony bearing on these questions is substantially as follows: About 6 o'clock on the morning of January 2, 1902, plaintiff was driving an inclosed milk wagon on Watervleit avenue, in the town of Globeville. The track of defendant crosses this avenue at an acute angle. Watervleit avenue runs north and south, and the track of defendant in a northeasterly and southwesterly direction. This relative position of the avenue and the track gives the space between the track to the north and the east side of the avenue a triangular shape. Plaintiff was driving south, with the intention of crossing the track of defendant. He was familiar with the surroundings, having been engaged in driving a milk wagon over this route for a considerable period previous to his injury, and knew that a train of defendant was due about this time. The morning was dark, cloudy, and foggy. For a distance of about 190 feet from the intersection of the avenue and the track of defendant the triangular space mentioned has a number of cottonwood trees growing upon it, about 12, but not so close to each other that at that season of the year they would interfere to any considerable extent with a clear view of the track to the northeast. There was also located upon this space two telephone poles. Something over 500 feet northeast

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of the intersection of the avenue and track a cottonwood tree was located on defendant's right of way, about 30 feet north of its track. The track is on a fill, about eight feet higher than the adjacent ground. At a distance of about 275 or 300 feet east of the point where the avenue crosses the track the latter crosses a bridge over the Platte river. This bridge is 200 feet in length, so that its east end is from 475 to 500 feet from the crossing in question. On the west side of the avenue, distant 47 feet from the main track, a feed store is located. Between this building and the track is a side track, upon which cars frequently stand, so that an unobstructed view of the track for any distance to the west when cars are on the side track cannot be obtained until after it is passed. From a quarter to half a mile east of the crossing there are switch and other lights, near or over the track. Plaintiff was familiar with these, as he had often observed them before. When plaintiff, according to his own statements, was distant about 190 feet from the track, he commenced looking towards the east for an approaching train, and, when within 50 or 60 feet of the track, stopped his team, opened the door of the wagon, looked and listened for a train, but did not see any approaching. He says, to use his own language: "The point where I stopped was particularly favorable to a view of the track from the north and east directions." He observed the switch and other lights above referred to, but did not see the headlight of a locomotive drawing a train approaching from the east, although he had often observed such a light on other mornings when driving in the same direction along the avenue. He was driving slowly, and continued to look to the east until he reached a point about 25 feet north of the track, but did not observe a train approaching. From the plat introduced it appears that from this point he had an unobstructed view of the track for an indefinite distance to the east, for there does not appear to be anything from that point to obstruct the view in that direction. When he reached the 25-foot point, he turned his attention to the west, and just as his horse started to cross the track the headlight of a locomotive drawing a train and approaching from the east flashed upon him. He struck his horses with a whip in an endeavor to get across the track ahead of the train, but his wagon was caught and destroyed, and he was severely injured. The train approached the crossing at a speed of from 20 to 30 miles an hour. No bell or whistle was sounded. There was no watchman on duty, and an ordinance of Globeville prohibited trains running at a greater speed than six miles per hour. A witness who was in advance of plaintiff between 100 and 200 feet noticed the train approaching as he crossed the track, and estimated that it was then between a quarter and half a mile away. The headlight of the locomotive was burning brightly. Another witness on behalf of plaintiff, who was on the porch of his place of business about 350 feet distant from the crossing, saw the train approaching. When he first saw it, it was 2,500 feet from the crossing. He noticed the headlight of the engine,

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for that was what attracted his attention, and could see that it was coming rapidly from the east.

*Skelton & Morrow*, for plaintiff in error.

*Wolcott, Vaile & Waterman* (W. W. Field and Henry McAllister, Jr., of counsel), for defendant in error.

GABBERT, J. (after stating the facts as above). Although the evidence establishes negligence on the part of the defendant, plaintiff cannot recover if his failure to exercise that degree of care which a reasonably prudent person would have exercised under similar circumstances was the proximate cause of his injury. *C., R. I. & P. Ry. Co. v. Crisman*, 19 Colo. 30, 34 Pac. 286. The important question, therefore, to determine is whether or not the testimony established as a matter of law that plaintiff was guilty of negligence, but for which he would not have been injured.

He knew a train was about due, and testified that distant about 190 feet from the track he commenced looking towards the east, and, when within 50 or 60 feet of the crossing, stopped his team, and looked and listened for an approaching train from that direction; that he did not hear or see one; that he noticed switch and other lights from a quarter to half a mile distant in the direction he looked; that, as he approached the track, he continued to look and listen until within 25 or 30 feet of the crossing, but neither saw nor heard the train which collided with him, but did see the switch and other lights above referred to. He then drove upon the track and was injured. Having testified that he stopped, looked, and listened for an approaching train, and not discovering one, his counsel invoke the rule that the credibility of his statements in this respect should have been submitted to the jury. This rule is not applicable, where there is but one inference which can reasonably be drawn from the undisputed facts. At the point where plaintiff first stopped, there was nothing to obscure his view along the track towards the east for a distance of 2,000 feet or more other than the trunks of a few leafless trees, and a couple of telephone poles, which would have done nothing more than momentarily obscure the headlight of the locomotive when a tree or pole was in the direct line of his vision and the headlight. He did notice the other lights referred to, and necessarily at this time the headlight was rapidly and continually changing its position. It was burning brightly. This is established by witnesses on his own behalf, one of whom crossed the track between 100 and 200 feet in advance of him, and discovered the approach of the train by its headlight, and estimated that the train was from a quarter to half a mile distant. The other witness noticed the same condition from a different point of view at the time when, according to all the testimony, the plaintiff himself was so situated that, if he had looked in the direction of the approaching train, he, also, should have recognized the headlight in question by its movement towards him. He says he continued to look until within 25 or 30 feet of the track, but did



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not see the train approaching from the east. From this point, according to the undisputed testimony, there was nothing whatever to obstruct his view for an indefinite distance to the east. At this time the approaching train, by a comparison of its speed with that he was traveling, could not have been distant more than 250 or 300 feet, and yet, according to his own statements, he did not hear the rumble which it must have made in crossing the bridge which it had just passed over, or distinguish its headlight from that of other lights shining at a quarter to a half mile beyond. He knew a train was about due from the east over the track he was about to cross.

In such circumstances, it seems incredible that he looked towards the east, as he says he did, and failed to notice the rapidly moving headlight when he first began to look, or its proximity when he was within 25 or 30 feet of the track, when the headlight must have been so distinctive by reason of its brilliancy and relative position to the other lights beyond of which he speaks. Clearly, although it may have been cloudy and foggy at the time, these conditions were not sufficient to obscure the brilliant headlight of the locomotive when he first looked, or when it was but 250 or 300 feet distant, when lights of less power in its near vicinity were discernible at the time he first looked, and when he last looked from a quarter to half a mile beyond. From all the facts and circumstances there is but one conclusion deducible, viz., he did not look, because, if he had, he could not have failed to discern the train approaching the crossing he was about to drive over. Where a physical situation renders the right of a matter clearly beyond all reasonable controversy, there is no conflict to be solved by a jury, because no just verdict can be rendered contrary to all reasonable probabilities. In such circumstances, the testimony of a witness to that which is physically impossible must be rejected, and a court will treat as unsaid by a witness that which, in the very nature of things, could not be as said. A trial court should not submit to a jury the determination of a fact about which, from all the testimony, there can be no dispute. Plaintiff not having looked for the approach of the train which struck his wagon failed to exercise that degree of care which he should, and it is beyond dispute that such failure was the proximate cause of his injury. The trial judge was therefore right in directing a verdict for the defendant. *Northern Pacific Ry. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Blumenthal v. B. & M. R. R. Co.*, 97 Me. 255, 54 Atl. 747; *Day v. B. & M. R. R. Co.*, 97 Me. 528, 55 Atl. 420; *Swart v. N. Y. Cent. & H. R. R. R. Co.*, 81 App. Div. 402, 80 N. Y. Supp. 906; *Marland v. Pittsburgh & L. E. R. Co.*, 123 Pa. 487, 16 Atl. 624, 10 Am. St. Rep. 541; *Fiddler v. N. Y. Cent. & H. R. R. R. Co.*, 64 App. Div. 95, 71 N. Y. Supp. 721; *Hook v. Mo. Pac. Ry. Co.*, 162 Mo. 569, 63 S. W. 360; *Dolfini v. Erie R. R. Co.*, 178 N. Y. 1, 70 N. E. 68; *C. & N. W. Ry. Co. v. Andrews*, 130 Fed. 65, 64 C. C. A. 399; *Marshall v. Green Bay & W. R. Co.*, 125 Wis. 96, 103 N. W. 249; *C. & E. I. R. R. Co.*

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v. Kirby, 86 Ill. App. 57. Many cases are cited by counsel for plaintiff in support of their contention that the question of his negligence should have been submitted to the jury. These cases, when analyzed, in no sense conflict with the conclusion we have reached, because it appears therefrom that the testimony bearing on the subject of the want of care of the party injured was either conflicting or of a character from which different inferences might reasonably be drawn on that question, or it appeared that the injured party had made a mistake with respect to the approach of a train in such circumstances as made it necessary to leave it to a jury to determine whether or not such mistake was the result of a failure to exercise proper care.

It is also contended on behalf of plaintiff that he might have assumed that the train would not approach the crossing at a greater rate of speed than that allowed by the ordinances of Globeville. This question is not presented, because plaintiff says he did not see the train which collided with his wagon. Consequently he cannot be heard to say that in passing over the crossing in question he relied upon being able to do so safely under the belief that the defendant would observe the ordinances in operating its train. A party cannot excuse his act by reliance upon that which, according to his own statement, is not the fact.

The judgment of the district court is affirmed.

Affirmed.

STEELE, C. J., and CAMPBELL, J., concur.

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**MATTESON v. NEW YORK CENT. & H. R. R. Co.**

(Supreme Court of Pennsylvania, June 3, 1907.)

[67 Atl. Rep. 847.]

**Witnesses—Cross-Examination—Scope.**—Where a witness testified as to the flooding of land by the construction of defendant's railroad bridge, and the size and extent of the gullies and depressions which resulted, he might be cross-examined as to whether the land was not subject to overflow before the bridge was built and as to the depressions then existing.

**Evidence—Admissions—Statements of Agent—Declarations After Event—Res Gestæ.**—Declarations of an agent within the scope of his authority when constituting a part of the res gestæ are admissible against the principal, but not when made at any other time.

**Negligence—Evidence—Repairs after Accident.\***—Repairs made after an accident do not in themselves give rise to a presumption of negligence.

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\*For the authorities in this series on the question of the admissibility of evidence of subsequent repairs or other subsequent precautions, in negligence cases, see foot-notes appended to *Beverly v. Boston Elev. Ry. Co.* (Mass.), 22 R. R. R. 753, 45 Am. & Eng. R. Cas., N. S., 753.

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Appeal from Court of Common Pleas, Tioga County.

Trespass by Lucia A. Matteson againsts the New York Central & Hudson River Railroad Company to recover damages for injuries to land alleged to have been caused by the construction of a bridge. From a judgment on a verdict in favor of plaintiff for \$2,017.16, defendant appeals. Reversed.

At the trial, when W. J. Ballou was on the stand, the following offer was made: "Mr. Owlett: I want to ask this witness if from the time he first knew this land in 1870, down to the time of the flood, if there was not a depression there, and if in the earlier years of his knowledge of that field if there was not water standing in there in ponds from four to five feet deep, for the purpose of showing this jury the character of that land and under the evidence of Mr. Matteson that it frequently overflowed there, to give them some knowledge of the true situation and value of that land. (Objected to, for the reason it is not cross-examination. If it does anything, it tends to open in this indirect way the defense in this case. The fact that 20 years ago there may have been pools of water upon this land cannot be relevant here; the witness having sworn prior to this flood there was no water course there. Objection sustained and evidence excluded. To which ruling by the court counsel for the defendant except and at their request this bill is sealed.)"

When the plaintiff was on the stand the following offer was made: "Counsel for the plaintiff propose to show by the witness on the stand, and the plaintiff in this case, that soon after the damage alleged in plaintiff's statement was suffered the superintendent of the defendant company came upon the ground in question and said to the plaintiff: 'Mr. Matteson, it looks as though we had pretty near ruined you. We expect to pay you for all the damage we have done—and we will. Just hold on, and don't be in a hurry, and we will settle with you.' This is to be followed by other evidence that this corporation afterwards instructed their trestle gang, or railroad gang, to go to that ground and remove those piles as quickly as possible, as they were liable for the damages sustained by the farmers as long as they were in there. This for the purpose of showing the corporation's own admission of their negligence. That the officer referred to as meeting Mr. Matteson on the ground is Mr. Crowley, superintendent of the Pennsylvania Division of the New York Central Railroad. (Counsel for the defendant objected to this offer as incompetent and immaterial. It is an effort to show a statement by a subordinate officer, or agent of the company, not shown to have any authority to bind the company for any such purpose, neither is it shown the character of the supervision which the agent or officer had. It is not shown whether he is general superintendent, division superintendent, or the extent of his authority or that he had any authority whatever to adjust claims or to bind the company in this regard. This offer is further objected to for the reason that in the main it is an effort to show the

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opinion of some unknown officer or agent of the company as to facts claimed to be irrelevant to this case, and that the evidence offered is incompetent for the further reason that it is an attempt to get the opinion of a witness not shown to have authority to speak on the subject and not shown to have been on the ground when the damage is alleged to have occurred, and who therefore cannot know of the cause of the damage. Objection overruled. Exception.)

Louis Costley was asked this question: "Q. You may state to the court if he said anything about the necessity of getting those [piles] out? (Counsel for the defendant object to what was said by the supervisor of bridge work on the Pennsylvania division as being improper and irrelevant, and from no point of view being proper evidence upon the issue now trying. It is proposed by the witness upon the stand, who has already testified to the condition of the trestle, to now show by him, that he, as one of the employees of the railroad, helped to remove these piles; that they were directed to do so by the superintendent of that class of work of the corporation defendant. The purpose of this offer is to show that these piles were recognized by the railroad company as their property and to show that they took charge of them and caused them to be removed. Objected to as being incompetent and wholly irrelevant and immaterial and not in any way helping to determine the issue being tried, and for the further reason that it does not appear in the offer that the piles were removed at or about the time of the injury or that the conversation referred to occurred about that time. The Court: 'Objection overruled for the purpose of showing the authority exercised by the man in charge of this work, and to show that he was an officer of the company.' To which ruling by the court counsel for the defendant except, and at their request this bill is sealed.)"

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

*E. H. Owlett, S. F. Channell, and Walter Sherwood*, for appellant.

*Henry A. Ashton and Chester H. Ashton*, for appellee.

STEWART, J. The question here at issue was the defendant's liability to respond in damages for the flooding of plaintiff's land, claimed by the plaintiff to have resulted from the manner in which defendant company had constructed the foundation for its bridge over the Cowanesque river. The case presents no peculiar features, and does not call for a general review. It is enough to indicate the specific errors committed on the trial which require a reversal of the judgment.

W. J. Ballou, a witness called by plaintiff, testified as to how the plaintiff's land was affected by the flooding, which he said was occasioned by the defendant's structure, and gave his estimate of the damage. He described how it had been washed, and the size and extent of the gullies and depressions which resulted.

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On cross-examination it was proposed to ask this witness whether, before the building of the bridge complained of, the land was not subject to overflow, and whether there were not at that time depressions on it and ponds four or five feet deep. The offer was excluded on the ground that it was an attempt to introduce defendant's case by way of cross-examination. However much it was in line with what defendant proposed to prove subsequently by way of defense, it was none the less entirely competent by way of cross-examination, and it was error to exclude it.

The plaintiff was permitted under objection to testify to certain admissions by the division superintendent of the defendant company at a later day as to the cause and extent of the damage done to the land. This was not by way of contradiction, but as substantive testimony. "The rule is well settled," says Sharswood, J., in *Penna. Railroad Company v. Books*, 57 Pa. 339, 98 Am. Dec. 229, "that what an agent says while acting within the scope of his authority is admissible against his principal, as part of the *res gestæ*, but not statements or representations made by him at any other time."

Like error was committed in allowing another witness for plaintiff, under objection, to testify to certain directions given by the defendant's supervisor of bridge work, for the removal of the piles which it is claimed caused the obstruction in the stream and the flooding of plaintiff's land. While the avowed purpose of the offer was to show admission by the company that the piles were the property of the company, a matter not in dispute, the inference the jury would most likely have derived from it would have been an implied admission of negligence in having the piles where they had been placed. The evidence was inadmissible for such purpose. Repairs made after an accident do not in themselves give rise to a presumption of negligence. *Baran v. Reading Iron Co.*, 202 Pa. 274, 51 Atl. 979. The evidence should have been excluded. The eleventh, twelfth, and thirteenth assignments of error are sustained.

Judgment reversed, and a venire facias de novo awarded.

## THOMPSON v. BALTIMORE &amp; O. R. Co.

(Supreme Court of Pennsylvania, June 4, 1907.)

[67 Atl. Rep. 768.]

**Negligence—Unprotected Turntable.**—In an action against a railroad company to recover for personal injuries to a boy injured by being struck by a projecting bar on a turntable with which children were playing, evidence held not to justify a verdict for plaintiff.

**Same—Injury to Child.\***—Where a railroad company erects on its own land a turntable, it is under no duty to take special precaution for the safety of children, though the turntable may tend to attract them and expose them to danger.

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Henry E. Thompson, by his father, Edward H. Thompson, and Edward H. Thompson in his own right, against the Baltimore & Ohio Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

*W. B. Linn*, for appellant.

*Chester N. Farr, Jr.*, and *John J. McDevitt, Jr.*, for appellees.

FELL, J. The defendant maintained a large train yard, used for the shifting and storage of cars and the receipt and delivery of freight, in close proximity to a thickly populated section of the city of Philadelphia. Ten or twelve feet from an entrance to the yard from a public street there was a turntable, which was not kept locked when not in use, but was fastened by a brake that any one could open. A high board fence surrounded the yard, but in places it was broken, and the gates were usually open. Little or no effort appears to have been made to exclude the public from the yard, and at times it was used by persons residing in the vicinity as a playground. One of the plaintiffs, a boy not quite eight years of age, entered the yard at night through an open gate—

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\*For the authorities in this series on the subject of the negligence of railroad companies in maintaining things dangerous and attractive to children, and in failing to warn them of the danger, etc., see foot-notes appended to *Hamilton v. Detroit, etc., Ry. Co.* (Mich.), 22 R. R. R. 669, 45 Am. & Eng. R. Cas., N. S., 669; *Walker's Adm'r v. Potomac, etc., R. Co.* (Va.), 22 R. R. R. 646, 45 Am. & Eng. R. Cas., N. S., 646; foot-notes appended to *Denver City Tramway Co. v. Nicholas* (Colo.), 22 R. R. R. 523, 45 Am. & Eng. R. Cas., N. S., 523; foot-notes appended to *Louisville Ry. Co. v. Esselman* (Ky.), 20 R. R. R. 627, 43 Am. & Eng. R. Cas., N. S., 627; foot-note appended to *Kansas City, etc., Ry. Co. v. Matson* (Kan.), 12 R. R. R. 675, 35 Am. & Eng. R. Cas., N. S., 675, where all the preceding authorities in this series are collected.



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way, and while standing near the turntable, with which some children were at the time playing, was struck by a projecting bar which they used in turning it, and was thrown into the pit and caught between the wall and the turntable.

The principles that fix the relation between a landowner and a person entering on the land without permission were fully considered in *Gillis v. Railroad Co.*, 59 Pa. 129, 98 Am. Dec. 317, a case in which the plaintiff was injured by the breaking down of a station platform on which he was standing, from mere curiosity, to witness the approach of a train. It was there held that the permissive use of the platform by persons not having business with the company imposed on it no liability for defects in construction, and that a person using the private property of another, by permission or sufferance, takes upon himself the risks incident to it. It was said in the opinion by Sharswood, J.: "It will appear on an examination of the interesting and elaborate discussions in the English courts of the question whether an action could be supported by such trespasser for personal harm occasioned by the springgun, mantrap, or dogspike, set on the grounds of the defendant, in which it was determined that, where there was no proper warning given, such an action well lies; that it rested mainly on the ground that a man cannot lawfully do indirectly that which it is unlawful for him to do directly. He cannot shoot or maim or set a ferocious dog upon a mere trespasser. He shall not there place a concealed machine where it will be likely to do the same thing, or let such a dog loose in his grounds without warning. *Deane v. Clayton*, 7 Taunt. 489; *Ilott v. Wilkes*, 3 B. & Ald. 304; *Bird v. Holbrook*, 4 Bing. 628. It is, however, equally well settled that the owner of property is not liable to a trespasser, or to one who is on it by mere permission or sufferance, for negligence of himself or servants, or for that which would be a public nuisance if it were in a public street or common where all persons have a legal right to be without question as to their purpose or business." In *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684, a contractor, who was in exclusive possession of land for the purpose of carrying out his contract, had caused an excavation to be made and had left it unguarded at night. A person crossing the land fell into the excavation and was killed. In the opinion denying the right to recover, it was said: "The law fully recognizes the right of him, who, having dominion of the soil, without malice does a lawful act on his own premises and leaves the consequences of an act thereby happening where they belong, upon him who has wandered out of his way, though he may have been guilty of no negligence in the ordinary acceptation of the term." In *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, a child under eight years of age was drowned in an abandoned well, 80 feet from a city highway, in an uninclosed lot which was a place of resort in hot weather. The instruction to the jury that: "The true principle which must be applied to a case of this kind is this: The owner of premises in the neighborhood of a populous city, and opening on a public highway, must

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so use them as to protect those who stray upon them”—was expressly disapproved, and the judgment for the plaintiff was reversed. In *Baltimore & Ohio Railroad Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706, a boy under six years of age went, for his own amusement, on the platform of a railroad station to observe an approaching train and was struck by an iron step which was bent and projected a few inches from the car. A judgment for the plaintiff was reversed on the ground that the company owed him no duty of protection under the circumstances. This principle has been applied in a variety of cases of trespass by children. In *Rodgers v. Lees*, 140 Pa. 475, 21 Atl. 399, 12 L. R. A. 216, 23 Am. St. Rep. 250, it was applied in a case where a child took hold of a chain which was a part of a hoisting apparatus and was over a sidewalk outside of the building line; in *Moore v. Railroad Co.*, 99 Pa. 301, 44 Am. Rep. 106, where a boy was walking along the tracks of a railroad on the outer ends of the sleepers and was injured by a passing train; in *Oil City, etc., Bridge Co. v. Jackson*, 114 Pa. 321, 6 Atl. 128, where a boy in crossing a bridge walked on a gas pipe five inches in diameter and fell through an opening in the floor. Of *Hydraulic Works Co. v. Orr*, 83 Pa. 332, relied on by the plaintiffs, it has often been said that it is authority for its own facts, and, as far as it appears to sanction the doctrine that a child cannot be treated as a trespasser, it has been expressly overruled. See *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, and *Rodgers v. Lees*, 140 Pa. 475, 21 Atl. 399, 12 L. R. A. 216, 23 Am. St. Rep. 250. In the first of these cases it was said: “In *Hydraulic Works Co. v. Orr*, there was a recklessness that may be said to partake of the nature of wantonness, and it is only upon this principle that judgment can be logically sustained.” In *Duffy v. Sable Iron Works*, 210 Pa. 326, 59 Atl. 1100, an open vat, into which hot tar and grease were run, had been placed in an open space so near the line of the street that a child might unconsciously walk into it. In *Rachmel v. Clark*, 205 Pa. 314, 54 Atl. 1027, 62 L. R. A. 959, the defendants had used for storage the sidewalk of a street in connection with an open paved space in front of their building, separated from the street only by an imaginary line. The negligence was in placing on a public way, where all persons had a right to be, a slab of slate in such a position that the touch of a child’s hand would cause it to fall.

The fact that the person injured was a child makes no difference, unless there was negligence. The plaintiff’s youth relieves him of the charge of contributory negligence, but it does not give rise to an imputation of negligence on the part of the defendant. He was where he had no right to be, on the property of the defendant, which it was using in a lawful manner for a lawful purpose in the conduct of its business. It owed him the duty not to injure him intentionally, but it was under no duty actively to take care of him either by keeping him out of the yard or by protecting him after he had entered it from his own acts or the acts of others, who, like him, had entered without per-

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mission. There was no negligence unless there was breach of duty. There was no breach of a duty owing an adult. An owner of land is not liable for its condition to an adult who enters without permission. Unless a different standard of duty is to be established as to a child, there was no liability in this case.

Whether an owner of land who makes changes on it in the course of its beneficial use, which tend to attract children and to expose them to danger, is under a duty to take special precautions for their safety, is a question on which there is a conflict of authority. That such a duty exists has been asserted in some jurisdictions and denied in others. The earlier cases on the subject followed *Railroad Co. v. Stout*, 84 U. S. 657, 21 L. Ed. 745, but the tendency of the later decisions is decidedly against the imposition of such a duty. Some of the courts that adopted the ruling in *Railroad Co. v. Stout* have since repudiated it, and others have followed it with hesitation, or have limited its application to a particular class of improvements. The establishment of such a duty would create a restraint, which in some cases would amount to a prohibition, upon a mode of beneficial use of land, for the protection of intruders and intermeddlers. It is difficult to see any ground upon which such a duty can be placed. An owner is not liable for leaving his land in its natural shape. Why should he be held liable for placing structures upon it which are harmless in themselves and are necessary for the lawful use he wishes to make of it? It cannot be said that he invites or allures children because no such intention in fact exists, nor that he sets a trap for the innocent and unwary. The law does not impose a duty upon the landowner to take special precautions for a class of persons, a doctrine which, if carried to its logical conclusion, would, as was said in *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, "charge the duty of the protection of children upon every member of the community except their parents." In *D., L. & W. Railroad Co. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727, it was said by Gummere, J.: "The viciousness of the reasoning which fixes the liability on the landowner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is unwarranted." If the standard of duty contended for is set up, it will be an exception to the general rule and a wide and dangerous extension of the liability governing the ownership of property. Where it would logically end it is difficult to determine. As was suggested in *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, it might make it "the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches." In the opinion in *Turess v. Railroad Co.*, 61 N. J. Law, 314, 40 Atl. 614, it was said by Magie, C. J.: "It is obvious that the principle on which the rule rests, if sound, must be applicable more widely than merely to railroad companies and the turntables maintained by them. It would require a similar rule to be applied to all owners and occupiers of land in re-

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spect to any structure, machinery, or implement maintained by them thereon, which possesses a like attractiveness and furnishes a like temptation to young children. He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water to his buildings; he who leaves his mowing machine or dangerous agricultural implements in his field after his day's work; he who maintains a pond in which boys may swim in summer and on which they may skate in winter—would seem to be amenable to this rule of duty." The doctrine of the so-called turntable cases has been disapproved in *Walsh v. Railroad Co.*, 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615; *Walker's Adm'r v. Railroad Co.*, 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80; *Railroad Co. v. Reich*, 61 N. J. Law 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727; *Daniels v. Railroad Co.*, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253; *Frost v. Railroad Co.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Paolino v. McKendall*, 24 R. I. 432, 53 Atl. 268, 60 L. R. A. 133, 96 Am. St. Rep. 736; *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481; *Dobbins v. Railway Co.*, 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856; *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148; and in many other cases. The doctrine is a sweeping innovation on the settled common-law rule that a landowner is not liable for the condition of his premises to one who enters them without permission. We are of opinion that it is not sound in principle, and that it cannot be sustained.

The judgment is reversed, and judgment is now entered for the defendant.

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(Supreme Court of North Carolina, May 27, 1907.)

[57 S. E. Rep. 469.]

**Torts—Actions—Parties—Defendants—Joinder.**—An action for a joint omission of duty may be made joint or several at the election of plaintiff, and the tort-feasors cannot be heard to complain, since the plaintiff's election finally determines the question.

**Removal of Causes—Citizenship of Parties—Fraudulent Joinder of Parties.**—In a petition for removal of a cause to the federal court on the ground of diverse citizenship, a mere general allegation of fraud in joining certain resident defendants as parties to the action is not sufficient, since it must be alleged and proved in what the fraud consists.

**Same—Allegations in Pleadings.**—On petition to remove a cause to the federal court on the ground of diverse citizenship, the question of separable controversy must be determined by the state of the record in the state court at the time of filing the petition, independently of the allegations in the petition or affidavit, unless the fact

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that the defendants were wrongfully made joint defendants for the purpose of preventing a removal of the cause is both alleged and proved.

**Torts—Joint and Several Liability—Complaint.\***—A complaint which alleges that plaintiff's intestate was killed in a collision of two trains caused by the negligence of a railway company and its train dispatcher and certain telegraph operators and station agents, who were all made defendants, and their negligent failure to perform and discharge the obligations which they owed to plaintiff's intestate, states a cause of action for a joint tort, and the defendants may be held answerable in the same action both at common law and under Clark's Code (3d Ed.) § 267, subsecs. 2, 3 (Revisal 1905, § 469), although plaintiff might have elected to sue the defendant separately.

**Removal of Causes—Defendants—Collusive Joinder—Objection—Motive for Joinder.**—In an action against a railway company and its train dispatcher and others for the killing of plaintiff's intestate, it is not material that the train dispatcher was joined as a party for the sole purpose of preventing a removal of the cause for the railway company to the federal court, nor as to the motive for bringing a joint action against the defendants, unless they were illegally joined.

**Parties—Defendants—Joinder—Insolvency of Defendant.**—Mere insolvency of a defendant cannot alone determine the right of a plaintiff to join him with others in an action for tort if he is liable, since the test is in the validity of the cause of the action and the good faith of the plaintiff in making the joinder, and insolvency does not destroy the remedy, but merely effects the prospects of collection.

**Pleading—Waiver of Objections to Complaint—Failure to Object before Answer.**—Where the allegations of a complaint, though not as specific as good pleading requires, were good under the law in the absence of a motion to make more certain or of a demurrer to the pleading, and sufficiently stated a cause of action for joint tort against several defendants, by failure to object before answering, any defect in the pleading was waived.

**Removal of Causes—Separable Controversy.**—Where a complaint in an action in a state court set up a joint tort, the denial thereof in an answer and in a petition to remove to the federal court could not affect the question of the separability of the controversy.

Appeal from Superior Court, Buncombe County; Cooke, Judge.

Action by Matilda Hough against the Southern Railway Company. From an order granting a petition for removal of the action to the federal court, plaintiff appeals. Reversed and remanded.

This action was brought to recover damages for the death of plaintiff's intestate, which is alleged to have been caused by the negligence of the defendants. The intestate was killed in a wreck resulting from the collision of two trains on the road of the rail-

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\*See foot-notes appended to *Eastin & Knox v. Texas & P. Ry. Co.* (Tex.), 24 R. R. R. 508, 47 Am. & Eng. R. Cas., N. S., 508.



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way company which were moving in opposite directions. The plaintiff alleges in her complaint that at the time of the collision the defendant W. C. Hudson was train dispatcher, the defendant L. D. Flack was telegraph operator and station agent at Swannanoa, and the defendant O. F. Hallam was telegraph operator and station agent at Black Mountain, all of them being in the employ of their codefendant, the Southern Railway Company, and that the plaintiff's intestate was at the same time the conductor of one of the colliding trains which was proceeding from Asheville to Salisbury, and in the proper discharge of his duties as such. The railroad at the time of the collision was being operated by the defendant corporation. The plaintiff further alleges, in section 4 of her complaint, as follows: "On the 18th day of February, 1906, the said W. R. Hough, the plaintiff's intestate, was killed by the negligence of the defendants. The said negligent killing of plaintiff's intestate was in and caused by the collision and wreck of two trains owned and operated by the defendant railway company between Swannanoa station and the town of Black Mountain, and the said collision, wreck, and killing was caused by the negligence of the defendants, and their negligent failure to perform and discharge the duties which they owed to plaintiff's intestate. By the negligent killing of the plaintiff's intestate, as herein set forth, the plaintiff has been damaged in the sum of \$50,000," for which sum she prayed judgment. The defendants the Southern Railway Company and W. C. Hudson jointly answered the complaint, and admitted the truth of all its allegations, except those contained in the fourth section thereof, and except, also, the allegation that the plaintiff at the time he was killed was in a proper discharge of his duty as conductor of the train from Asheville to Salisbury, and these were denied. The qualification of the plaintiff, as administrator of the intestate, is also alleged and admitted. The defendants specially averred in their answer, as a defense to the action, that the intestate's death was caused by his own negligence, in that he disobeyed a written order delivered to him when he left Asheville, and by which he was notified that the train proceeding from Salisbury to Asheville, and known as "Second No. 11," was running 2 hours and 40 minutes late; that it then became his duty under the known rules and regulations of the company to take the siding at Swannanoa station with his train, which was "Second No. 11," and wait for the other train to pass. Instead of doing so, he negligently undertook to run his train beyond Swannanoa to Black Mountain, and met second No. 11 between the two stations, where the collision occurred. The complaint was filed on December 11, 1906, and the answer on February 23, 1907. Between the two dates—that is, on February 21, 1907—the defendant the Southern Railway Company filed a petition in the state court for the removal of the case to the United States Circuit Court, alleging diverse citizenship between the railway company and the plaintiff, and making the necessary formal allegation as to the amount in controversy. It is then alleged in the



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petition that the petitioner operates one of the largest railway systems in this country and is amply solvent and able to pay any judgment the plaintiff may recover in this action, and that W. C. Hudson and the other defendants are insolvent and unable to pay any amount. The petitioner further alleges as follows: "That she is advised, informed, and verily believes that the plaintiff wrongfully and unlawfully joined with the petitioner, the said W. C. Hudson, L. D. Flack, and O. T. Hallam as sham defendants for the fraudulent purpose of preventing the removal of this suit by your petitioner, the real defendant, to the federal court; that the said defendants, W. C. Hudson, L. D. Flack, and O. T. Hallam, were in no wise connected with or responsible for the collision in which the plaintiff's intestate lost his life; that in no view of this suit are the said W. C. Hudson, L. D. Flack, and O. T. Hallam more than mere nominal or formal parties joined with your petitioner, for no other purpose on the part of the plaintiff than to deprive your petitioner of its legal right of removal herein; that no substantial relief could possibly be obtained against the said defendants W. C. Hudson, L. D. Flack, and O. T. Hallam; and that they are neither proper or necessary parties to a complete and final determination of this action. If said W. C. Hudson, L. D. Flack, and O. T. Hallam are proper and necessary defendants in this suit, which is expressly denied, the said controversy is of a separable nature and is a separable controversy, as appears from the complaint filed herein." The petitioner, the Southern Railway Company, duly executed, tendered, and filed a proper bond with the petition, which was approved by the judge, who ordered that the action be removed according to the prayer of the petitioner. To this order the defendant excepted and appealed to this court.

*Craig, Martin & Winston*, for appellant.

*Moore & Rollins*, for appellee.

WALKER, J. (after stating the case). This is an action in tort for causing the death of the plaintiff's intestate by negligence. The defendant the Southern Railway Company was the master, and its codefendants servants of that corporation, and it is alleged that as such they owed a duty to the intestate, which they disregarded and neglected, and that their joint omission of that duty proximately resulted in his death, whereas if they had, while acting in co-operation, and in a careful manner, as they should have done, in the discharge of the duty, each bestowing upon it that degree of care required of and due from him or it, the injury and death would not have occurred. This is the substance of the cause of action, which, being for a tort, may be made joint, by uniting all the tort-feasors as defendants in one action, or several, by suing each in a separate action. The plaintiff, or party aggrieved by the wrong, may make it joint or several at his election; and it is not open to the wrongdoer to complain of the election so made, or to dictate how he shall make his choice. If the injured party chooses to sue the wrongdoers jointly, he thereby declares

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that the tort shall be joint, and the law so regards it, without listening to or even hearing from the wrongdoer. And so it is when he sues them separately. His election finally determines what shall be the character of the tort, whether joint or several. This principle has controlled the courts in deciding upon applications for the removal of causes from the state to the federal courts, whenever it becomes necessary to inquire whether a separable controversy is presented as between the plaintiff and the nonresident defendant, or opposite party of diverse citizenship. It has been well expressed by Mr. Justice Gray in *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528: "As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, 'separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleading'"—citing *Railroad v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1043, 1161, 29 L. Ed. 331; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. Ed. 899; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265, 30 L. Ed. 1235. A case much like this and certainly sufficiently like it in principle to control its decision is *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1043, 1161, 29 L. Ed. 331, in which the plaintiff sued the defendants for malicious prosecution, and one of the latter sought to remove the case as to him to the federal court. In respect to his right to do so the court said: "There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants acting in concert. The cause of action is several as well as joint, and the plaintiffs might have sued each defendant separately or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to do this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only does not divide a joint action in tort into separate parts, any more than it does a joint action on contract." *Natl. Docks Ry. Co. v. Penn. Railroad Co.*, 52 N. J. Eq. 58, 28 Atl. 71; *W. U. Telegraph Co. v. Griffith*, 104 Ga. 56, 30 S. E. 420. The principle thus stated was held, in *Railroad v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63, to apply where railway companies made joint contracts for the transportation of goods. With reference to the provision of the removal acts that

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"there shall be a controversy, which is wholly between citizens of different states, and which can be fully determined as between them," the court further said in that case, speaking of the count in the declaration on the joint contract: "On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants." So, where an employee sued his employer for injuries in tort and joined a cause of action in contract against his codefendant, an accident insurance company, upon a policy issued to indemnify the employer against loss by injuries to his employees, it was held that the insurance company had no separable controversy with the plaintiff so as to authorize a removal of the case as to it. *Moore v. Iron & Steel Co.* (C. C.) 89 Fed. 73. See, also, *Insurance Co. v. Carrier*, 91 Tenn. 537, 19 S. W. 755; *Fidelity Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898; *Putnam v. Ingraham*, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. Ed. 65. Moon, in his work on the Removal of Causes (section 142), thus summarizes the result of the decisions: "There are many causes of action which are, in their nature, joint and several. A plaintiff may sue all the parties liable, or sue any one or more of them, at his election. Where the plaintiff has a right under the law to sue defendants jointly, the defendants cannot obtain an advantage from the fact that he also has a right to sue them separately. If a plaintiff sues two or more persons jointly in such a case, the fact that the plaintiff might have brought several actions against each defendant instead of one action against them all does not make the suit embrace separable controversies. This rule applies to actions upon joint and several contracts. It applies as well to actions in tort, which are in their nature joint and several. Where a plaintiff brings a suit, the declaration in form charging a joint tort against two or more defendants, it is not sufficient to make the controversy between plaintiff and one defendant separable that the complaint does not state facts sufficient to constitute a cause of action against him. The sufficiency of the complaint as to the various defendants is a matter for the determination of the state court. The fact that there may be, under the local practice, a judgment rendered for one defendant, and against another, upon the trial, does not affect the question whether a case contains a separable controversy." But the case of *Railway Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, is precisely like our case in its facts, with but one slight and immaterial exception. There the plaintiff's intestate was killed while crossing the track of the defendant corporation at the junction of that and another track, and the action was brought against the railway company and its employees who were operating the train to recover damages for their joint negligence, which was alleged to have caused the intestate's death. That case and ours are, therefore, practically identical and governed by the same principle. It was there held, following prior decisions, that in an action of tort the cause of action is whatever the plaintiff declares it to be in his pleading, and matters of defense do not

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necessarily have the effect of dividing or disintegrating it into separate controversies, so as to be availed of as ground of removal by a nonresident defendant, and that, when concurrent negligence is charged, the controversy is joint, and not separable, and, as the complaint in the case, when reasonably construed, alleged that kind of negligence, the state court did not err in retaining jurisdiction when passing upon an application for removal, as no separable controversy as to the applicant, within the meaning of the act of Congress, was presented. It is too obviously true to require any argument to demonstrate it that the mere fact of the employees in the case just cited being engineer and fireman, and in this suit the train dispatcher, cannot differentiate the two cases. It was further said in *Railway v. Dixon* that, "in respect of the removal of actions of tort on the ground of a separable controversy, certain matters must be regarded as not open to dispute," and the rule we have stated is then held to be among them. The two cases are further alike in that, a fraudulent joinder of defendants for the purpose and with the motive of preventing a removal to the federal court is alleged in the petitions for removal in both cases, and in the *Dixon* Case held insufficient without proof. The case of *Powers v. Railway*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, is cited by the court to sustain its position in the *Dixon* Case, and there the subject is fully discussed, and the conclusion reached that an action in tort is joint or several, as the pleader may choose to make it, unless the defendants were sued jointly, as a device and with a fraudulent purpose of defeating the right of removal, when, in fact, no cause of action existed against the nonresident and the assertion of his liability to the plaintiff is a mere sham or pretense. But this must be alleged and proved by the defendant in his petition for the removal of the cause. *Railroad v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473. See, also, *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. Ed. 899; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269; *Connell v. Smiley*, 156 U. S. 335, 15 Sup. Ct. 353, 39 L. Ed. 443; *Railway v. Martin*, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055; *Wilson v. Oswego Township*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; *Bellaire v. Railway Co.*, 146 U. S. 117, 13 Sup. Ct. 16, 36 L. Ed. 910; *Life Ass'n v. Farmer*, 77 Fed. 929, 23 C. C. A. 574; *Thurber v. Miller*, 67 Fed. 371, 14 C. C. A. 432. There was no proof of fraud in this case. The defendant, who petitioned for a removal, simply controverts the allegations of the complaint, for that is what the petition means, and all that it means. Its vituperative expressions prove nothing. Calling an act fraudulent does not make it so. It must be alleged and proved in what the fraud consists. We have practically nothing before us but the joinder and the bare allegations of fraud. That will not do.

Another principle equally well settled in the law of removal is that the question of separable controversy must be determined by the state of the record in the state court at the time of filing the petition independently of the allegations in the latter or in the

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affidavit of the petitioner, unless he both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal of the cause. *Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; *Railway v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Wilson v. Oswego Township*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; *M. C. P. & S. Ass'n v. Ins. Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; *Moon on Removals*, § 141. The complaint in this case states a cause of action for a joint tort, and although the plaintiff might have elected to sue the defendants separately, they are also liable to him jointly and may be held answerable for their wrong in one and the same action. This was so at the common law. *Railway v. Dixon*, 179 U. S. 137, 21 Sup. Ct. 67, 45 L. Ed. 121; *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; *Alpha Mills v. Engine Co.*, 116 N. C. 797, 21 S. E. 917; *Cook v. Smith*, 119 N. C. 350, 25 S. E. 958; 15 Enc. of Pl. & Pr. 560, and note; *Staton v. Railroad* (at this term) 56 S. E. 794. They can certainly be joined as defendants under the Code of this state. *Clarke's Code* (3d Ed.) § 267 (2) and (3), and notes; *Revisal 1905*, § 469. This being so, where two defendants are sued together, and the plaintiff demands judgment against both, the court cannot assume that either one of them is the real party against whom the plaintiff intends to prosecute his action, and that the other has been joined merely for the fraudulent purpose of depriving the real defendant of his right of removal. In order to sustain the jurisdiction of the federal court on that ground, it is necessary for the removing defendant to allege and prove such fraudulent purpose. *Doremus v. Root* (C. C.) 94 Fed. 760. It was said by the court in *Railroad v. Wangelin*, *supra*, citing and quoting from *Plymouth Co. v. Amador Co.*, 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232: "It is possible, also, that the company may be guilty and the other defendants not guilty; but the plaintiff in its complaint says they are all guilty and that presents the cause of action to be tried. Each party defends for himself, but until his defense is made out the case stands against him, and the rights of all must be governed accordingly. Under these circumstances, the averments in the petition that the defendants were wrongfully made [parties] to avoid a removal can be of no avail in the circuit court upon a motion to remand until they are proven; and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on the petitioning defendant. The corporation was the moving party, and was bound to make out its case." And in *Little v. Giles*, 118 U. S. 600, 7 Sup. Ct. 32, 35 (30 L. Ed. 269), the court says: "Giles [the petitioner] could not, by merely making contrary averments in his petition for removal, and setting up a case inconsistent with the allegations of the bill, segregate himself from the other defendants, and thus entitle himself to remove the case into the United States court. This matter has been fully considered in numerous cases." *Louisville & Nashville Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; *Farming-*



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ton *v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114; *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154, 29 L. Ed. 328; *Starin v. New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388; *Sloane v. Anderson*, 117 U. S. 278, 6 Sup. Ct. 730, 29 L. Ed. 899; *Insurance Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898; *Core v. Vinal*, 117 U. S. 347, 6 Sup. Ct. 767, 29 L. Ed. 912; *Mining Co. v. Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232. It is not material that, as alleged in the petition for removal, W. C. Hudson was joined as a party defendant for the single purpose of preventing a removal of the case by the Southern Railway Company to the federal court, nor is it a matter of any moment what the plaintiff's motive was for bringing a joint action against the defendants, unless they were wrongfully and illegally joined. *Tobacco Co. v. Tobacco Co.* (at this term) 57 S. E. 5. When a party is in the lawful assertion of a right in bringing his action, either as to form or substance, the law disregards his motive as unimportant and having no practical bearing upon the question of his right to proceed in the prosecution of the suit, as he has elected to do. Black's *Dillon on Removal*, § 146. A plaintiff cannot well be right and wrong at the same time in proceeding by action to recover damages against those who have injured him. Testing the right of removal by the case as made in the present record, as it stood at the time of the application, and even including the petition as a part thereof, we see no ground upon which it can be urged that the defendant the Southern Railway Company has entitled itself to have the case transferred and tried in the federal court. The record proper clearly does not disclose any such right, and the petitioner has neither sufficiently alleged nor attempted to prove that the defendants were improperly joined in the action. *Railway v. Dixon*, 47 S. W. 615, 104 Ky. 608 (affirmed in same case 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 21). There must of necessity be such allegation and proof. *Offner v. Railroad*, 148 Fed. 201, 78 C. C. A. 359.

The questions we have discussed have recently been fully considered, and the principles upon which we rest our decision of this case sustained, in *Railway v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441. That case disposes of all matters raised on this record adversely to the petitioner's contention. The latter makes the broad and sweeping charge in the petition that its codefendants were fraudulently made parties for the purpose of depriving it of the right to have the cause removed, but it assigns no good or valid reason why this is so. No proof is offered, and no fact found indicating that to have been the purpose of the plaintiff. The only ground of attack stated is that the codefendants are insolvent, and for that reason the plaintiff had no right to join them. Mere insolvency of a defendant cannot be permitted alone to determine the right of a plaintiff to join him in the action, if he is liable for the tort. Insolvency does not destroy the remedy, but can only affect the ability of the plaintiff,



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who has a good cause of action and reduces it to judgment, to obtain the fruits of his recovery. A cause of action unquestionably valid may be prosecuted in perfect good faith against an insolvent person. The test is not the amount that may eventually be realized upon a recovery, but the nature of the cause of action itself, as being one good or not good in law against the codefendant alleged to have been wrongfully united with the petitioner, and the good faith of the plaintiff in making the joinder. As said by Chief Justice Fuller in *Railway Co. v. Dixon*, 179 U. S. 135, 21 Sup. Ct. 69, 45 L. Ed. 121: "The question to be determined is whether the Court of Appeals erred in affirming the action of the [state] circuit court in denying the application to remove. And that depends on whether a separable controversy appeared on the face of plaintiff's petition or declaration. If the liability of defendants, as set forth in that pleading, was joint, and the cause of action entire, then the controversy was not separable as matter of law, and plaintiff's purpose in joining Chalkey and Sidles was immaterial. The petition for removal did not charge fraud in that regard or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry." There are no facts showing any fraud alleged in this case. Allegation itself insufficient and unsupported by proof it has been shown cannot avail the petitioner. *Tobacco Co. v. Tobacco Co.* (at this term) 57 S. E. 5.

While the averments of the complaint are not as specific or definite as good pleading requires that they should be, they are good under our law, in the absence of any motion to make them more definite and certain, or of a demurrer to the form of the pleading, and the complaint, as it is, sufficiently states a cause of action for a joint tort against all of the defendants. By not moving for a more definite statement, or by not demurring, the railway company waived any defect in the pleading. Revisal 1905, §§ 496, 498; *Wood v. Kincaid* (at this term) 57 S. E. 4. The defendant corporation did not ask that the complaint be made more specific in respect to the allegations of negligence, nor has it demurred; but, on the contrary, it has filed a joint answer with Hudson denying the negligence as to both defendants. This denial in the answer, and the one to the same effect in the petition, cannot affect the question as to the separability of the controversy. *Staton v. Railway* (at this term) 56 S. E. 794. In the case last cited and in *Tobacco Co. v. Tobacco Co.*, *supra*, some of the questions involved in this case are fully and learnedly discussed by Justice Connor.

There is nothing decided in *Wecker v. National E. & S. Co.*, 27 Sup. Ct. 184, 204 U. S. 176, 51 L. Ed. —, that militates against the views herein expressed. Uncontradicted evidence was considered in that case, without objection, in the federal court on a motion to remand, and the fact was actually found that the codefendant of the petitioner was in no way liable to the plaintiff, having had no connection whatever with the alleged negligence, and it was further found as a fact that the plaintiff had not joined

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the codefendant of the petitioner with the latter in good faith, but for the sole purpose of preventing a removal of the suit. It is thus distinguishable from the other cases we have cited in support of our ruling.

Our conclusion is that the court below erred in ordering a removal of the case to the United States Circuit Court. Its order is therefore reversed and set aside, with directions to enter an order denying the prayer of the petition.

Reversed.

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**JACKSON v. SOUTHERN RY., CAROLINA DIVISION, et al.**

(Supreme Court of South Carolina, Aug. 13, 1907.)

[58 S. E. Rep. 605.]

**Railroads—Companies Liable for Injuries—Lessors and Lessees.—**

Where both a lessor railroad and a lessee are sued for the negligence of the lessee, a nonsuit should not be granted to the lessor, unless it should also be granted to the lessee.

**Master and Servant—Fellow Servants.**—Whether a bystander is a fellow servant with a station agent, who calls him in to assist in rolling cars away from a fire, is for the jury.

**Same—Incompetency of Fellow Servant.\***—A master is only required to exercise due care in selecting his servants, and is not liable for injuries caused to a servant by reason of the incompetency or inefficiency of a fellow servant where he exercised such care.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of York County; J. C. Klugh, Judge.

Action by W. F. Jackson, Jr., against the Southern Railway, Carolina Division, and the Southern Railway Company. Judgment for plaintiff, and defendants appeal. Reversed.

See 54 S. E. 231.

*J. E. McDonald*, for appellants.

*Wm. B. McCaw*, for respondent.

POPE, C. J. This is the second appeal in this case. 73 S. C. 557, 54 S. E. 231. The facts are as follows: On the night of October 9, 1903, a large fire took place in Tirzah, a station on defendant's road in York county. The fire had done much damage and was threatening to destroy several freight cars standing on a side track between the fire and defendants' depot. In order to save the cars and the station, which would necessarily have caught had the cars been burned, S. M. Carothers, defendants' agent at Tirzah, sought to roll the cars down the track. In pur-

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\*See note appended to *Texas & P. R. Co. v. Johnson* (Tenn.), 4 Am. & Eng. R. Cas., N. S., 441.

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suance of this plan he called to Will Roach and George Wilson to help him, and he himself got upon the cars to work the brakes. Will Roach having failed to respond to his request and George Wilson being unable to move the cars, Carothers called one or more persons to his aid, among whom was the plaintiff, W. F. Jackson, Jr. To facilitate moving the cars he ordered George Wilson to uncouple them. Jackson, according to his own testimony, believing that Wilson had carried out the order, got between the cars and was pushing, when the car behind caught his right foot, crushed his ankle, and bruised his right leg considerably. Plaintiff alleged negligence on the part of the defendants in not furnishing him, through their representative, S. M. Carothers, a safe place to work, reasonably safe and suitable appliances with which to work, a competent servant to uncouple the cars, and a sufficient and competent force to move them. The defendants deny any negligence on their part, and allege that plaintiff's injury was due to an unavoidable accident and that the injuries were caused by the acts of fellow servants, and therefore they are not liable. The case came on for trial at the May, 1906, term of court for York county. At the conclusion of the plaintiff's testimony defendants moved for a nonsuit. Judge J. C. Klugh, the presiding judge, refused the motion and allowed the case to go to the jury. The result was a verdict of \$6,000 for the plaintiff. The motion for a new trial having been refused, defendants appeal to this court.

1. The first exception raises the point that the motion for a nonsuit should have been granted as to the defendant Southern Railway, Carolina Division, as there was a total failure of proof tending to show negligence on its part. It was admitted on all sides that the defendants occupied the relation to each other of lessor and lessee. Under our law the defendant Southern Railway is agent of its lessor, and the lessor is responsible for all acts of negligence on the part of the Southern Railway's officers and agents. *Smalley v. Railway*, 73 S. C. 572, 53 S. E. 1000; *Franklin v. Railway*, 74 S. C. 332, 54 S. E. 578; *Reed v. Railway*, 75 S. C. 170, 55 S. E. 218. Therefore, unless the nonsuit could have been granted as to the Southern Railway, no error was committed in refusing it as to the Southern Railway, Carolina Division. Let us consider, then, if the motion should have been granted as to the lessee. The motion was made on the grounds that there was no evidence tending to show negligence on the part of the defendants, and that plaintiff's injuries, if he were injured, were due solely to the acts of fellow servants. These grounds resolve themselves into the question whether Carothers was the representative of the master and a superior servant having a right to control and direct the services of the plaintiff. On the former appeal it was held that there was testimony going to establish this relation and the nonsuit was properly refused. On this trial the evidence is equally strong, if not stronger. Carothers himself testified that he had control of defendants' property at Tirzah. Several witnesses testified to the same effect. The property be-

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ing in danger, he called upon the plaintiff to aid in protecting it, and the plaintiff responded. Under these circumstances we think the question was properly submitted to the jury to say whether he was a superior or a fellow servant. The nonsuit, therefore, was properly refused.

2. The next question raised by the defendants' exceptions is that the circuit judge charged the jury that, in order to constitute the relation of fellow servants, there must be equality in the matter of doing work. This exception misconstrues the charge. Throughout Judge Klugh seemed anxious to impress upon the jury that difference of rank did not necessarily prevent persons from being fellow servants. After charging defendants' request to this effect, he added these words: "That makes clear the distinction that I have been seeking to bring to your attention all along between the relation of fellow servants and the relation between the superior servant representing the master and the under servant, and I so charge you." It is impossible that they jury could have been misled by the words objected to. Therefore we overrule the objection.

3. The circuit judge charged the jury in effect that if the master fails to employ competent servants, and an employee is injured by reason of the incompetency or incapacity of his fellow servants, then the master is liable. The defendants object to this charge on the ground that it renders the master absolutely liable if injury results from the employment of incompetent servants. This contention must be sustained. It is true that one entering service does not assume the risk arising from the negligent selection of incompetent servants, and it is also true that evidence of incompetency of a servant raises a prima facie presumption of negligence in the master selecting him, in the absence of evidence of due care in selection. But it was error to charge the jury that if the master fails to employ competent servants, and an employee is injured by reason of incompetency or incapacity of his fellow servant, then the master is liable, for the master is liable only for due care in the selection of his servants. It is true the circuit judge did charge: "Now, after the employer has exercised reasonable care in selecting employees, he is not bound to compensate a fellow servant for the negligence of his fellow servants, as I have already instructed you." But he immediately followed it with this inconsistent and erroneous instruction: "But if he fails to employ competent fellow servants, and an employee is injured by reason of the incompetency or incapacity of the fellow servants to do the work they are employed to do, that is a risk the employee does not assume; but the employer is bound to compensate him if he was injured by the incompetency of his fellow servants, just as much as he is bound to compensate him if he is injured by reason of the unsafe or unsuitable appliances that might be necessary for the doing of the work and that are furnished by the employer."

The defendants' fifteenth request to charge was: "The law is that when one enters into the employ of another he assumes the

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natural and ordinary risk of such employment, which includes the negligence of a fellow servant, if the master has selected such fellow servant with due care. If the jury should find that Carothers had authority to direct and control those who were working under him, and if they should find further that he gave orders and directions, but that such orders and directions were not obeyed or carried out, and that that was the proximate cause of the plaintiff's alleged injury, then the plaintiff cannot recover, and the verdict must be for the defendant." In commenting on this request the circuit judge again emphasized the error in these words: "That is, if you should find that those orders were not carried out because of the negligence of the fellow servant to whom they were given. If you should find that they were not carried out because of the inefficiency or incompetency of a fellow servant, the defendant would be liable, because you must bear in mind the difference between the liability of the employer for the negligence of his fellow servants and his liability for inefficiency and incompetency. He is not liable for the negligence. He is liable if he has selected incompetent or inefficient fellow servants, just the same as he would be liable for a defect in any other appliance which he furnishes that would be necessary to do the work, and so I charge you." This, in effect, makes the master a guarantor of the competency of his servant, whereas all that the law imposes upon the master is the exercise of due care in selecting his servants. The question of due care under all the circumstances should have been submitted to the jury.

4. The last alleged error is failure of the circuit judge to grant a new trial on the ground of insufficiency of evidence to sustain the verdict. There was testimony on all the material issues in the cause. The jury heard the case and rendered a verdict for the plaintiff. The circuit judge, on the motion for a new trial, we must take for granted, carefully considered the testimony, and his conclusion was that the verdict was proper. Under the well-settled law this court cannot review the evidence. *Miller v. Railway*, 69 S. C. 116, 48 S. E. 99; *Jones v. Hiers*, 57 S. C. 427, 35 S. E. 748; *Wilson v. Assurance Co.*, 51 S. C. 549, 29 S. E. 245, 64 Am. St. Rep. 700.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded for a new trial.

CRANE *v.* PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, June 3, 1907.)

[67 Atl. Rep. 877.]

**Railroads—Accident at Crossing.\***—A railroad company when its train crosses a much traveled highway must exercise a degree of care commensurate with the danger, and give some sufficient notice of its approach and moderate its speed to a reasonable degree.

**Same—Failure to Signal.**—In an action for injuries at a crossing, where there is a conflict in the evidence as to whether the bell was rung, the question whether failure to ring the bell is negligence is for the jury.

**Same—Contributory Negligence.**—Where there is evidence that deceased stopped, looked and listened before going on the track, but the evidence is conflicting as to where he did so, it is for the jury to determine whether he was guilty of contributory negligence.

Appeal from Court of Common Pleas, Warren County.

Action by Pauline Z. Crane against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

The court charged, in part, as follows:

"On May 25, 1906, the husband of the plaintiff in this case, Pauline Z. Crane, was killed while attempting to cross the Philadelphia & Erie Railroad, run and managed by the Pennsylvania Railroad Company, at Spring Creek, in Warren county. The suit is brought by Pauline Z. Crane, the wife of the deceased, and by her son. It would appear from the uncontradicted testimony in the case that the defendant's employees were running an engine, which passed along by the Spring Creek station some time in the forenoon of May 25th. The engine had been to Corry to help a freight train on the upgrade between Warren and Corry, and was returning to Warren with the engineer and fireman, who had charge of the engine, and was backing at the time of the accident. \* \* \* Now, gentlemen of the jury, the plaintiff has offered testimony tending to show that the deceased, Mr. Crane, came up this road, which runs parallel to the railroad tracks, and turned down on the road which crosses the railroad tracks. And the plaintiff's testimony tends to show that, after passing a little below or southerly from Donaldson's store, he stopped and looked and listened, and the plaintiff has called quite a large number of witnesses who testified to that fact. They have also, more or less

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\*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to the rate of speed of trains approaching crossings, see foot-notes appended to *Illinois Cent. R. Co. (Ky.)*, 22 R. R. R. 312, 45 Am. & Eng. R. Cas., N. S., 312; *Norris v. New York, etc., R. Co. (Conn.)*, 22 R. R. R. 17, 45 Am. & Eng. R. Cas., N. S., 17.



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of them, testified to what they could see from that point, looking up the track, or westward towards Corry on the track. And some of them tell you that looking back of the depot, which would be northerly from the depot, and across the point of the hill, which comes down westerly of the depot, they could see the track for about 300 feet, and others put it less. I do not remember of any of them putting it more than that. And they mention the number of cars that they could see on the track, looking westward from the point where they saw the deceased stop. Evidence is given by the plaintiff also to show that that was the usual place where people, traveling the public road, stopped to look and listen. And some evidence is given to show that at no other point, going from that point towards the railroad tracks, could they see the track, looking westward, until after they passed the corner of the depot, and I do not remember of any evidence which showed that they could see up the tracks, and see the tracks, until after they passed the corner of the railroad depot. If there is any, gentlemen, you will recall it.

“The evidence shows that the deceased, Mr. Crane, passed along down on his wagon, was sitting back on the brake or hounds of the wagon, at the rear end, drove along towards the crossing—the evidence of the plaintiff I am speaking of now—and as he drove towards the crossing some of the testimony shows that he was looking up the track. I believe there is no evidence which shows that he stopped after the point below Donaldson’s store, but there is evidence to show that he looked up the track before attempting to cross the track, but not that he stopped his team. Now, it is claimed on the part of the plaintiff that the railroad company was negligent in the rapidity with which its employees ran the engine at that time, and also that it was negligent in not giving the proper signals that should be given in approaching a station like Spring Creek, and where there was a crossing at or near the railroad station. Now, we call your attention, gentlemen, to the evidence generally on that point, without going over it all, or going over what each witness testified to. \* \* \* The engineer testifies that he blew the whistle back near the whistling post, one long blast, and that he blew the signals, four for the block, which was a signal to the operator to give him the block. He testified that those were blown. And he testified that the bell was rung all the way down along there, after the whistles were blown. And, if I remember correctly, the fireman corroborated him in these respects. Others were called, who testified to hearing the long blast of the whistle, and some others, if I remember correctly, testified to hearing the other blasts, which was a signal to the operator for the block. You will remember how many there were, and their testimony exactly. And I think some of the witnesses called on the part of the defendant testified to the ringing of the bell. That, gentlemen, is for you, and you will recall who they were, and how many of the witnesses.

“Now, gentlemen of the jury, we say to you as a matter of law

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that it was incumbent upon the railroad company that these signals should be given there—that is, the usual signal which is given in approaching a depot should be given, and that is, as stated by the railroad employees, one long blast—and there does not seem to be much dispute between the plaintiff's and defendant's witnesses but what that was given. The point where it was given the witnesses differ about somewhat. Now, gentlemen of the jury, we say to you that, if a whistle was blown there, it would be no matter what kind of a whistle, how many blasts, it would be notice to anybody attempting to cross that a train or engine was coming, and would be a warning to anybody who was attempting to cross. There is some evidence that the bell was not rung. If you find it was not rung, that would be an element of negligence on the part of the defendant company. Now, gentlemen, your first duty will be to direct your inquiries as to the testimony in regard to negligence of the defendant. If the defendant was not negligent in the warning of the engine there that day, there could be no recovery by the plaintiff, and you would not have to go any further in your investigations, but if you find from all of the evidence, taking all the evidence into consideration, that the defendant was negligent in respect to not giving the proper signals, or the question of rapidity of running, which may also be taken into consideration by you, and you have heard the testimony on that subject, if you find that the defendant was negligent, then it is your duty to go farther and determine whether or not there was any negligence on the part of Mr. Crane there in crossing the road, or attempting to cross the railroad, which contributed in any way to his death.

“And we say to you as a matter of law that it is the duty of any person, and was the duty of Mr. Crane that day, to stop, look, and listen, before attempting to cross the railroad track. That is the imperative, binding rule of law upon everybody, before attempting to cross a railroad track, to stop, look and listen. Now, you heard the evidence in relation to Mr. Crane's stopping just after he passed Mr. Donaldson's store, and looking and listening, and the testimony is, as I remember it, that that was from 60 to 70 feet from the railroad tracks. The majority of the witnesses put it, if I recollect right, about 70 feet, but perhaps it ranged from 50 to 70 feet. Now, was that the usual place where a team stopped, and was it the place where Mr. Crane could get the best view westerly, up the railroad track, the direction from which this engine was coming? If that was the best place and the usual place, he discharged his duty by stopping and looking and listening there, if you find that he did stop and look and listen. His duty is not wholly discharged by stopping and looking and listening at the usual place. He must continue his vigilance until he gets across the railroad track. And it was his duty to look, and not only his duty to look, but to stop, again if necessary. And the authorities say that, if he cannot see without it, he must get off and go ahead of his horses, where he can see, and take those precautions. And it

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is for you, gentlemen, to take these matters all into consideration. Did he do that? If he did not do it, it is for you to say whether or not he was guilty of contributory negligence.

"The evidence, as I remember it, shows that he did look, he continued to look, but I do not remember any evidence that he either stopped, listened, or got off of the wagon. But this question of whether or not he was guilty of contributory negligence is for you. But we say to you that that is the law; that it is necessary for him to take these precautions before crossing a railroad track. Now, gentlemen of the jury, take the evidence all into consideration, the evidence of the defendant's witnesses on the subject of contributory negligence, as well as those of the plaintiff, and determine from all of the evidence in the case. I call your attention further to the situation, as shown by the testimony, past the corner of the depot. As I remember the evidence, it was about 25 feet from the corner of the depot to the railroad track. And there is evidence, on part of the defendant, that from a point a little south from the corner of that depot, from the place where the witnesses stated that they could see, that they could see up the track for quite a long distance. They put it from 500 feet to 800 feet, as I remember the testimony, that they could see up the track from those various points there, between the depot and the railroad track, where he looked. \* \* \* If you find that he was not guilty of any negligence which contributed to his death, then he would be entitled to recover, if the railroad company was guilty of negligence. And, if you come to the question of recovery, then you must consider his earning power. Now, gentlemen, the law does not give you any definite means of measuring or determining that. You must determine it as best you can from the age of the decedent, who was 55 years old, and what you consider from the evidence that you have heard his earning power would be for the time which he might probably live. Sometimes mortuary tables are given as to the average length of time that a man would live (or what would be the average mortality of persons of that age), but this has not been given in this case, and you will have to figure it out for yourself, if you come to that question, and you must use judgment and care if you reach that question, gentlemen, and figure out in a businesslike way what would be his earnings per year for the period which you come to the conclusion might be an average period of a man's life who had reached that age. And you may take into consideration the health and physical constitution of the man, as shown by the testimony, in determining that question, and what evidence has been given in relation to his earning power."

Defendant presented these points:

"(4) The evidence of witnesses on the part of the plaintiff, who testified to not hearing the engine whistle, unless there were such circumstances that would call their attention to this fact, would be negative testimony, and if the jury find from the evidence that a number of witnesses on the part of the defendant

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testified to the fact of hearing the whistle blown, and also the bell on the engine ringing for this crossing, being positive evidence as against negative testimony, their verdict should be for the defendant. Answer: This, gentlemen, is answered in the affirmative, all except this last clause, 'their verdict,' etc."

"(8) Under all the evidence the verdict should be for the defendant. Answer: This point is refused, and the evidence is referred to you under the instructions which we have given you."

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

*J. Ross Thompson*, for appellant.

*D. U. Arird and Edward S. Lindsey*, for appellee.

STEWART, J. The plaintiff's husband was killed by a passing engine while attempting to cross the tracks of the defendant company at a public crossing with his team. The negligence charged in the statement was as follows: "And the said defendant, through the carelessness and negligence of its servants and employees on aforesaid date, to wit, May 25, 1906, carelessly, wrongfully, and negligently ran or drove one of said defendant's engines rapidly, without giving warning, over and across said public highway at the crossing aforesaid, so that the said David Crane on said date, to wit, May 25, 1906, while passing along and upon said road or highway at the crossing aforesaid, using due care and caution, was struck," etc. If we are to give the words here employed nothing beyond their exact and literal meaning, the charge of negligence was fully met and answered by the testimony of plaintiff's own witnesses, for a number of them testified that a signal by whistle was given at the accustomed place. A strict construction would make the charge mean that no warning whatever was given; but it was evidently intended to charge that no adequate or sufficient warning as measured by the duty of the defendant under the circumstances was given. The learned trial judge so understood it. The case was tried on this theory, and the absence of exceptions shows the defendant's acquiescence. Defendant's fourth point, the refusal of which is the subject of the first assignment of error, was not directed to this feature of the case. It had reference, not to the charge of negligence contained in the statement, but to the law of the case, and was properly refused. The distinction made in the point between positive and negative testimony was correct enough, and so much of the point was affirmed, but it did not follow as a result that the verdict should be for the defendant.

There can be no fixed and invariable standard of duty either with respect to the rate of speed to be observed by railroad companies at public crossings, or the manner in which approach to such crossings is to be signaled. All that can be said is that it is the duty of a railroad company in the running of its trains to exercise cars according to the circumstances, and, when the railroad track crosses a much traveled street or highway, the company is bound to exercise a degree of care commensurate with the danger, to give some sufficient notice of the trains' approach,

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and to moderate the speed of the train to such a rate as, under the circumstances, is reasonably consistent with public safety. The law does not designate the mode in which these precautions against injury are to be exercised. This much was said in *Lehigh Valley Railroad Co. v. Brandtmaier*, 113 Pa. 610, 6 Atl. 238, and it has been many times repeated. In the present case, while there was agreement between the witnesses that the whistle of the engine was sounded at or near the whistling post, more than a half mile west of the crossing, there was very positive disagreement as to whether it was sounded more than once, or whether any signal by bell had been given. One of plaintiff's witnesses testified that, although the engine on this particular occasion was running at unusual speed, yet some of the customary signals were omitted. It could not be said as matter of law that the one whistle which witnesses on both sides agree was given was an adequate warning. Therefore it became a question for the jury to determine from all the evidence in the case whether the defendant had come short of its duty in this regard, and a submission of the question was unavoidable.

So, to, with respect to the question of the injured party's contributory negligence. An imperative duty rested upon him to stop, look, and listen, and there was evidence going to show that he did this; but the contention of the defendant was that he did not do it at the places or in the manner that proper regard for his own safety would have suggested. Whether he did all that he was bound to do depended upon the situation as he found it, and the circumstances in which he was placed; and it became a question for the jury under proper instructions as to the law. The court's refusal to give binding instructions for defendant is the subject of the second assignment, and this is overruled.

The instruction of the court on the question of damages was meager; too meager, perhaps, to insure a full understanding by the jury of what the law contemplates in this regard. It is only necessary to advert to this feature of the charge with this expression of its insufficiency to secure a fuller instruction at another trial of the case which must be the result of the manifest error which is made the subject of the fourth and last assignment.

In the general charge the learned judge instructed the jury as follows: "There is some evidence that the bell was not rung. If you find it was not rung, that would be an element of negligence on the part of the defendant company." However this expression may have been qualified in the answer to points submitted, it stands out so conspicuously in the charge, and would necessarily be so misleading if uncorrected, that we cannot be sure that it did not influence the result. Whether the failure to ring the bell, if there was such a failure, was negligence, became a question for the jury to determine from all the circumstances in the case. It was not for the court to declare it as matter of law.

Judgment reversed, and a venire facias de novo awarded.



## VINNETTE v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington, Oct. 11, 1907.)

[91 Pac. Rep. 975.]

**Death—Action for—Contributory Negligence of Beneficiary.\***—The father of a six year old child left her in the custody of her mother, who negligently allowed her unattended to cross railroad tracks in constant use by trains. Upon the child's return she was killed by the cars. Held, in an action for her death by the father, as administrator, for his sole benefit, that his contributory negligence precluded his recovery.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by Joseph E. Vinnette against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

*Carroll B. Graves*, for appellant.

*Geo. P. Rossman*, for respondent.

CREW, J. Action by Joseph E. Vinnette against the Northern Pacific Railway Company to recover damages for the death of plaintiff's child. The plaintiff alleged that his daughter, six years of age, was struck and killed by a backing train of freight cars while crossing defendant's tracks within the limits of the city of Seattle upon a platted street, and upon a crossing used and traveled by the general public; that a city ordinance then in force prohibited the running of any steam engine and cars in Seattle at a rate of speed exceeding six miles per hour; that the defendant was backing a train of about 16 cars at a greater rate of speed; that the defendant had no person on the lookout at the forward end of the train as it was moving backward; that no signal was given, by bell, whistle, or otherwise; and that the child, being rightfully upon the alleged street and crossing, was killed by reason of such negligent acts of the defendant. The answer, after admitting the killing of the child, denied other material allegations of the complaint, and affirmatively alleged that the child was a trespasser upon the railway tracks situated in defendant's switching yards, and that her death was occasioned by the negligence of her parents, who then and there permitted

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\*For the authorities in this series on the subject of the effect of the contributory negligence of parents on the right to recover for the injuries or deaths of their children, see foot-note appended to *St. Louis S. W. Ry. Co. v. Cochran* (Ark.), 18 R. R. R. 798, 41 Am. & Eng. R. Cas., N. S., 798; *Davis v. Seaboard Air Line Ry.* (N. Car.), 18 R. R. R. 163, 41 Am. & Eng. R. Cas., N. S., 163; *Mattson v. Minnesota & N. W. R. Co.* (Minn.), 21 R. R. R. 109, 44 Am. & Eng. R. Cas., N. S., 109; *Jacksonville Elec. Co. v. Adams* (Fla.), 20 R. R. R. 295, 43 Am. & Eng. R. Cas., N. S., 295.



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her to play along and upon the tracks. The reply denied the affirmative allegations of the answer. On trial the jury returned a general verdict in favor of the plaintiff for \$600, and made special findings in answer to interrogatories submitted as follows: "At what rate of speed was the string of cars moving at the time it struck the child, Catherine Vinnette? A. About six miles an hour. At the time mentioned in the complaint, and for some time prior thereto, was the switch track, lying to the west of the main track at and near the point of the accident, used for the purpose of switching and storing cars? A. Yes. Did the men in charge of the string of cars, or either of them, have any knowledge of the child's whereabouts, prior to the collision with her, and did they know of the accident before their attention was called to it after the child had been killed? A. No. Who was left in charge of the child, and had the custody of the child, the morning of the accident, and just prior to the accident? A. Her mother. If you answer to the last interrogatory that it was the mother of the child, find and state if the mother allowed the child to cross said railway track and enter into play with some other child or children near and in the vicinity of the railway tracks of the defendant, and across said tracks from its home. A. Yes." From a judgment entered on the general verdict, the defendant has appealed.

The appellant's assignments of error present the single question of the sufficiency of the evidence to sustain the general verdict and judgment. The evidence shows that appellant had, when the accident occurred, two lines of railway track, running in a northerly and southerly direction, and used exclusively for distributing, moving, and storing freight cars; that all trains enter and leave the city on other lines; that one of the tracks was known as the "shore line," from which numerous spurs extended to various warehouses and industrial plants; that the other was known as the "long siding," being used for switching and storing cars; that the two tracks, being substantially parallel, were located side by side on a graded strip of land about 30 feet wide, between a high bluff or hill to the east and tide lands to the west; that the soil of the hillside is sustained by bulkheads; that the west line of the grade is sustained by a sea wall; that quite a number of small houses or shacks are located along the tracks, abutting the same on either side, those to the west being over tide lands and supported by piling; that a few feet further west is a public street or boulevard, located on an elevated bridge constructed on piling over tide lands, and occupied in part by a street car line running into the city of Seattle; that respondent's house is built on piling between the railroad track to the east and the boulevard to the west; that he had access to the boulevard; that to the east of his house, towards and abutting the railway, he has a small dooryard, floored with boards resting on piles; and inclosed with fence and gate. There was no competent evidence that any street had ever been platted, opened, graded, or maintained in the space occupied by appellant's tracks between the

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sea wall and hill, nor that such space had ever been traveled by teams or used for general public traffic. There was evidence, however, showing that people living in the small houses and shacks above mentioned frequently crossed and walked along the tracks at various points according to their own convenience. The evidence further shows that at the time of the accident a switching crew was backing about 16 freight cars on the long siding; that respondent had left the child in charge of his wife, its mother, at their home, who permitted her to cross the tracks to the hill on the opposite side and play with other children; that, after watching the child go across, the mother went into her kitchen, leaving the door open; that shortly thereafter the train backed down the long siding, when the child, returning alone and unattended, stepped on the track and was killed; that no employees of the appellant saw the child until after the accident; that no employee was on the car which struck the child; and that appellant made no claim to ringing its bell or sounding its whistle, its employees being engaged in moving freight cars within its switching yards, and not, according to its contention, upon any public street or highway. The only substantial conflict in the evidence was over respondent's contention that a well-defined pathway existed, which was used by the general public and intersected the tracks immediately in front of his house. In his brief the respondent continually assumes the existence of a highway, called "Ninth street," upon which the railway tracks were located, and upon which his house fronted to the east; but there was no competent evidence showing that any such street ever existed. Respondent contends that, at the time the child was killed, she was on Ninth street opposite his house, on the above-mentioned alleged pathway, that had been used by the public for many years. There was evidence given by different witnesses to the effect that people, both adults and children, living in the immediate neighborhood, had frequently crossed the tracks; but the evidence fails to show that there was a well-worn track at any particular point, as seems to be contended by respondent. A number of excellent photographs were admitted in evidence with the consent of both parties; but while they most clearly and distinctly show the buildings, railway tracks, abutment, sea wall, piling, respondent's dooryard, fence, and gate, with other surroundings, it is nevertheless impossible to distinguish upon them the slightest indication of any street or any pathway across or upon the railway tracks at any point near the scene of the accident. The substantial effect of the evidence as disclosed by these photographs and the oral testimony of the various witnesses is that the different persons who lived in the neighborhood and who walked back and forth over the tracks did so at such points as were severally convenient to them. But, were we to assume that a distinct pathway did exist opposite respondent's house, we could not, for reasons hereinafter mentioned, permit the respondent to recover in this action.

The appellant contends that the train was not running at an

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excessive rate of speed; that there was no public street, crossing, or path, at or near the point of the accident; that it was not required to give any signal by bell or whistle; that the child was a trespasser; and that the contributory negligence of the parents bars a recovery by respondent. As we view the evidence, in connection with the special findings, there is no showing of negligence on the part of the appellant sufficient to make it liable for damages. But assuming that such negligence did exist, we are nevertheless compelled to hold that the negligence of the respondent as father of the child, and the mother in whose care she was left, was such that no recovery by respondent can be permitted. The child was of such tender years that no negligence could be imputed to her. She was unable to protect herself or realize the dangers to which she was subjected. Had she been, not killed, but permanently injured, and were she now prosecuting an action for damages, the question whether the negligence of her parents could be imputed to her and bar a recovery might possibly arise. Here the father sues for damages resulting from the death of his child, and he will be the sole beneficiary of any judgment recovered. In *Bellefontaine, etc., Ry. Co. v. Synder*, 18 Ohio St. 399, 98 Am. Dec. 175, an action prosecuted by a minor child, by her next friend, to recover damages sustained by personal injuries to herself, the Supreme Court of Ohio held that the negligence of a parent or custodian of the child, who was by reason of tender years unable to care for herself, could not be imputed to the child, so as to defeat her right to recover damages from a railway company for the injuries caused by its negligent acts. But in *Bellefontaine Ry. Co. v. Snyder*, 24 Ohio St. 670, when the father of the same child afterwards sued in his individual right for damages to himself arising from the loss of the services of his child in consequence of the same accident, the Supreme Court of Ohio held that he could not recover, as his right to do so was barred by his own negligence; it having appeared that he intrusted the child to the custody of another, who was guilty of negligence contributing to the accident. This distinction between an action for the benefit of the child and for the sole benefit of the negligent parent has been recognized by this and other courts. *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855; *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64; *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 South. 555, 3 Am. St. Rep. 751; *Williams v. T. & P. R. R. Co.*, 60 Tex. 205; *Bamberger v. Citizens' Street R. Co.*, 31 S. W. 163, 95 Tenn. 18, 28 L. R. A. 486, 49 Am. St. Rep. 909.

The unfortunate death of this little girl naturally arouses every feeling of human sympathy, and doubtless appealed to the jury; but the facts are that respondent's wife, with whom he left the child, assented to her going across the tracks unattended; that the mother watched her while leaving; that she was permitted to return alone; and that while doing so she was struck by the train, before any of the switching crew saw her or knew of her presence.

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The acts of the parents constitute the most flagrant negligence upon their part. They must have known that the very existence of the railroad tracks was itself a sign of danger; that an unattended child only six years of age should not have been permitted to play upon or near them; and that, if allowed to do so, the child would in all probability be seriously injured or killed. Parents cannot delegate to trainmen or other persons in charge of dangerous agencies the care and protection of their unattended children. In the case of *Westerberg v. Kinzua Creek, etc., R. R. Co.*, 142 Pa. 471, 21 Atl. 878, 24 Am. St. Rep. 510, the Supreme Court of Pennsylvania said: "If we concede there was negligence on the part of the company in permitting the car to become detached and run down the road without any one to control it, the fact remains that the children were walking upon the track; and, while they could not be charged with contributory negligence by reason of their tender years, this suit is brought by their parents, who may be properly so charged. A parent owes a reasonable duty of protection to his children, and cannot cast the whole of that duty upon strangers. If he permits them, when of tender years, to wander off in places of known danger, and by reason thereof an accident occurs to them, he has no just claim to make others bear the consequences of his own neglect. We have a number of cases in which this principle has been enforced. In *Philadelphia, etc., R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, it was said that children of a tender age cannot be upon a railroad track without a culpable violation of duty by their parents or guardians. In *Philadelphia, etc., R. R. Co. v. Long*, 75 Pa. 257, it was said by Agnew, C. J.: "To suffer a child to wander in the street has the sense of permit. If such permission of sufferance exist it is negligence." To the same point is *Cauley v. Pittsburg, etc., Ry. Co.*, 95 Pa. 398, 40 Am. Rep. 664. And see, also, *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365." See, also, 1 Thompson's Commentaries on Law of Negligence, § 333; *Evansville, etc., R. R. Co. v. Wolf*, 59 Ind. 89; *Jeffersonville, etc., R. R. Co. v. Bowen*, 40 Ind. 545; *Senn v. Southern Ry. Co.*, 124 Mo. 621, 28 S. W. 66. In *Bamberger v. Citizens' St. R. Co.*, 31 S. W. 163, 95 Tenn. 18, 28 L. R. A. 486, 49 Am. St. Rep. 909, the action was prosecuted by the father, as administrator of his deceased child, for the benefit of himself as next of kin, and the Supreme Court of Tennessee, discussing his contributory negligence, said: "The underlying principle in the whole matter is that no one shall profit by his own negligence, and to allow the father, who has been guilty of negligence, to recover, notwithstanding that negligence, when he brings the suit as administrator, although he could not do so in his own right, would defeat this underlying principle by a mere change of form, when the entire recovery, in either event, goes to him alone. Upon principle, we think that, no matter how the suit is brought—whether as administrator or as father—it can be defeated by the father's contributory negligence, when he is sole beneficiary."

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Assuming that the evidence in this case disclosed facts sufficient to go to the jury upon the question of the appellant's negligence, yet the negligence of the parents of this child was sufficient to demand a judgment for appellant. The house in which respondent lived was located upon and abutted the railroad. The evidence and exhibits show the place of the accident to have been a veritable death trap for a small child. The mother, as found by the jury, had been left in the custody of the child at the time of the accident. She took the child to the door, and permitted her to cross the tracks and play with other small children. The testimony shows that the tracks were frequently used by appellant. The parents should have known that cars might be passing and switching there at any moment. They could not have placed their child in greater peril. The mother's testimony shows that she must have been aware of its dangerous position. No parent should be permitted to recover for his own benefit damages resulting from the death of his child, where he himself has been guilty of negligence which proximately contributed to the accident causing such death. The honorable trial court erred in refusing to sustain the appellant's motion for judgment notwithstanding the general verdict of the jury.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

FULLERTON, MOUNT, ROOT, and DUNBAR, JJ., concur.

## NORFOLK &amp; W. RY. CO. v. DEAN'S ADM'R.

(Supreme Court of Appeals of Virginia, Nov. 21, 1907.)

[59 S. E. Rep. 389.]

**Railroads—Injuries to Persons on Track—Discovery of Danger.\***—Where a railroad company knows of the dangerous position of a person on its track, and that such person is unconscious of his peril and will take no measures for his own protection, it is its duty to do all that can be done, consistent with its higher duties to others, to avoid running such person down, regardless of his own negligence.

**Same—Question for Jury.**—Where, under the evidence, reasonable men may differ as to whether a railroad did all that was required of it to avoid running a person down after discovery of his peril, the case is for the jury.

**Same—Right to Presume That Persons on Track Will Leave.†**—A railroad company has the right to assume that a grown person, in the apparent possession of all his faculties, seen on its track will get out of the way of an approaching train, and is not liable unless, after

\*See foot-notes appended to Cincinnati, etc., Ry. Co. v. Hill's Adm'r (Ky.), 22 R. R. R. 52, 45 Am. & Eng. R. Cas., N. S., 52.

†See foot-notes appended to San Antonio, etc., Ry. Co. v. McMillan (Tex.), 23 R. R. R. 245, 46 Am. & Eng. R. Cas., N. S., 245.

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the company in the exercise of ordinary care could have discovered that he was not going to get off the track, it could have avoided running him down.

**Same—Sufficiency of Evidence.**—Evidence in an action for the death of plaintiff's intestate on the track held to show that the railroad did all that was required of it to avoid running him down after discovery of his peril.

Error from Circuit Court, Tazewell County.

Action by one Dean's administratrix against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

*Henry & Graha* and *S. D. May*, for plaintiff in error.

*Wm. H. Werth* and *Chapman & Gillespie*, for defendant in error.

KEITH, P. Dean's administratrix sued in the circuit court of Tazewell county to recover damages for the wrongful death of her intestate, and filed a declaration containing two counts, to which the defendant company demurred, and the court sustained the demurrer to the first, but overruled it to the second count. Thereupon the plaintiff filed another count, which was demurred to, and the demurrer overruled. A trial was then had, which resulted in a verdict of the jury, subject to the defendant's demurrer to the evidence. Upon that verdict the court rendered judgment in favor of the plaintiff, and the case is before us upon a writ of error awarded by one of the judges of this court.

The circuit court filed a written opinion in support of its judgment, in which it says that the first count in effect charges that the place on defendant's track where plaintiff's intestate was killed was daily used by a large number of people, which fact was known to the defendant company, and thereby it became and was the duty of the defendant company to keep a lookout for persons on its track, so as to discover and not to injure them; that it neglected this duty, and by reason of this neglect plaintiff's intestate was killed.

"The second count," continues the court, "avers, in effect, that after the crew in charge of the defendant company's train had discovered intestate was on the track in front of said engine, and that he was unconscious of his danger and would take no measure to protect himself from the danger, the said crew in charge of said engine failed to use any measures whatever to prevent injuring plaintiff."

The circuit court was of opinion that there could be no recovery upon the first count, because of the contributory negligence of the person injured, but rests the case solely upon the second count in the declaration, in which the case presented is that, after it became apparent to the crew in charge of defendant company's train that intestate of plaintiff was on the track in front of the



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engine, that he was unconscious of his danger, and would take no measures to protect himself, the crew failed to use any measure to prevent the accident. Such being the issue to be determined, it is needless to consider so much of the evidence as relates to the use of the track as a public passway, or as to whether or not the person injured was a licensee or a trespasser. He was a human being, and when his dangerous position was seen and known, and that he himself was unconscious of his peril and would take no measures for his own protection, it became the duty of the railroad company to do all that could be done consistent with its higher duties to others to save him from the consequences of his own act, regardless of whether he was guilty of contributory negligence or not. *Seaboard & Roanoke R. Co. v. Joyner's Adm'r*, 92 Va. 355, 23 S. E. 773.

This being the narrow issue to be decided, it becomes necessary to consider the evidence bearing upon it with care, and if, as a result of that inquiry, it shall appear that there is room for a difference of opinion among reasonable men, then, in accordance with the decision of the Supreme Court of the United States in *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, and with *Kimball & Fink, Rec'rs, v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901, which have been so frequently followed in this court, the case is one proper for a jury, and the demurrer to evidence should have been overruled.

At the point of the accident the railway is double-tracked; one track being used by trains moving toward the west, and the other by trains moving toward the east. It was the habit of pedestrians who used these tracks for a passway to walk upon them in a direction opposite to that in which trains were accustomed to move, so that the train using the track would be in front of the person upon the track and moving toward him. A man walking west, therefore, would be upon the track used by east-bound trains, while a man going toward the east would be upon the track used by trains going in the opposite direction. But, while this was the customary and usual way of moving the trains upon the tracks, it not unfrequently happened that a train going west would be upon the east-bound track, or a train going east upon the west-bound track. In other words, the tracks were used at this point as was most convenient in the shifting and movement of trains, in order to perform the various duties of the railroad company. Upon the morning of the accident there was a freight train, consisting of 55 or 60 cars, drawn by two engines, moving west upon the west-bound track; and there was a light engine and tender, moving tender in front, and also going west, upon the east-bound track. As they approached a bridge over Bluestone river, Dean, the man who was killed, was seen walking upon the east-bound track in front of the tender and near the west end of the bridge.

The first witness examined by defendant in error was A. W. Tabor. He did not see the accident, and his evidence bears only upon the locality, which we have endeavored to describe, its use

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by people, and the result of certain experiments which he tried, tending to show how far down the track a man sitting upon the bumper of the tender of the engine that caused the accident could have seen a man standing on the track; but his evidence is not very material, because, as has been already said, there is no doubt that the trainmen saw the deceased, and it may be conceded that they saw him at such a distance as that the engine might have been stopped without doing him any injury, if it further appears that he was then in apparent danger and was not likely to take any measures for his own protection.

The first witness for defendant in error who saw the accident was Whitworth. He says that on the day in question he was in charge of a coal train that works at Pocahontas at night; that he came to the Flat Top yards and got instructions to take his train to Mullin's Siding, which is about a mile toward the east from Falls Mills, the station near which the accident occurred. Having put his train at Mullin's Siding, as directed, he was returning, in accordance with his orders, to Flat Top yards, and was sitting on the back end of the tank when he noticed a man walking down the track. The engine was moving, it will be remembered, tender in front. The witness, continuing, says: "When I first saw the man I wasn't thinking about his being run over, and I didn't pay much attention to him until I got closer, and then I hollered, and signaled to the engineer to stop; but it didn't do any good, as he didn't pay any attention to it at all, and we ran over him and killed him." Dean was within two or three steps of being off the bridge when first seen by this witness at a distance of about three telegraph poles, or in the neighborhood of 180 feet. Witness says that he cannot say exactly how far the engine moved while he was watching the man; that he was expecting him to step off the track; that it was a matter of daily occurrence that people walked on the railroad track until the engine was in 8 or 10 feet of them, when they would step off; and that "if we stopped the train every time we see a man on the track it would take us from now until next Christmas to get to Bluefield"; but that probably it was half the distance between two and three telegraph poles "before I made any alarm, or something like that; I couldn't say exactly." The first signal which he gave to the engineer, when he found that there was danger of injury to Dean, was what the witness denominates as the "steady" signal. "I didn't waive him down, I just held my hand out." He was then examined rigidly as to what the result of the signal was—as to whether or not the engineer put on the emergency brake; but in reply to this line of examination the witness said that he could not tell whether the emergency brake was applied after he had given the signal. It appears, further, from his testimony, that what is known as the "service brake" differs from the emergency brake only in degree. If the full force of air is turned upon the brake, that is an "emergency brake." In ordinary cases less than the full force is turned on, and that is the service brake. In other words, there is only one set of brakes, and the difference consists in the amount of air pressure which is applied.

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The sum of this witness' testimony is this: That he first discovered Dean upon the track at a distance of about three telegraph poles, or 180 feet; that at the moment of his discovery he did not consider him in danger; that it is a very usual thing for people to walk on the railroad track, and by stepping to the right or left they reach a place of safety, and that oftentimes this is not done until the train has approached within a few feet; that he had passed over half the distance which had intervened between him and the man when he first saw him—that is to say, 90 or 100 feet—when he gave the engineer the signal to "steady"; that he could not say exactly at what point this signal was given; and that after he had passed over about half the remaining distance, it then appearing to him that the man was in danger, the engineer was given the second signal to stop his engine. It appears that during this time the bell was being rung by the fireman in the cab.

The next eyewitnesses to the accident examined testified on behalf of plaintiff in error, and their testimony is not to be considered upon a demurrer to evidence, if it be in conflict with that of the witnesses for defendant in error.

R. B. Ferguson was the engineer in charge of the engine which did the injury. After leaving his train at Mullin's Siding, he says: "I was on the east-bound track going west, and there was a train going west on the west-bound track when we struck Dean. We came around a little curve, and the fireman was sitting up in the window and ringing the bell. He hollered to me to look out, or hold her, or something to that effect. I slammed the brake in the emergency, and reversed my engine, and we ran down about a couple of engine lengths, and he said we ran over a man, and I think we ran about two engine lengths after he hollered at me before I came to a dead stop, and there was a man laying in the middle of the track." The engineer did not see the man before he was killed. He was running at the rate of about 15 or 18 miles an hour. He is positive that he put on the emergency brake and reversed his engine at once. Again he says: "I gave her the whole braking power she had. She slid about two engine lengths—I couldn't tell you how far—and the wheels locked."

W. D. Tabor was the fireman on this engine. He says: "I saw some one walking in front of the engine on the track, and I called Mr. Ferguson's attention to it. Just as soon as I did, he threw the air in the emergency and stopped as quick as he could. We had done run over the man, though, before he stopped." When witness first saw the man he was about 60 feet away, and just getting off the bridge on the west end. This witness also states that he was at the time ringing the bell, and had been ringing it for nearly three-quarters of a mile; that the whistle was blown at the crossing above Falls Mills, and was also sounded by the engineer after the fireman called his attention to the man upon the track. Being asked whether there was anything else that could have been done to stop the engine and save the man, he replied: "No, sir. Q. What was the man doing when you

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saw him. A. He was walking along the middle of the track, and paid no attention, and didn't seem to know we were coming."

Defendant in error relies in great measure upon the statement of the witnesses that Dean did not seem to be paying any attention. It must be remembered that his back was to the witnesses. They could not see his countenance, and their opinion would, therefore, seem to be of little value. The positive evidence, by the sole eyewitness of the accident who testified on behalf of defendant in error, is that he had his eye upon the man; that when he first saw him he did not consider him in danger; that as soon as he felt any apprehension as to the situation he gave the engineer the signal to "steady," and immediately followed it with the signal to stop; that it was a matter of frequent occurrence to see men walking upon the track and remain upon it until the engine came close upon them.

Reliance is placed by defendant in error upon the fact that the freight train was passing at the time, and that the noise it occasioned prevented Dean from hearing the train approaching him from the rear; but that circumstance would be of value only in dealing with the question of contributory negligence, and not with the duty of the railroad company after it actually saw Dean on the track.

So, too, the custom of the company to run its west-bound trains upon the west-bound track, and its east-bound trains upon the other track, is of no value in the determination of the precise point in issue here; the sole question being whether or not, after Dean's peril was discovered, the agents of the railroad company did all that was required of them to save him from injury.

There is no conflict of evidence here. If the statement of Whitworth, the conductor, be taken alone, all was done that should have been done under the circumstances of the case. If the emergency brake had been applied at the instant Whitworth discovered the presence of Dean upon the track, the accident would have been averted; but in the honest exercise of his discretion, in the light of his long experience, he did not at that moment consider Dean in a position of peril. He appears to have been an intelligent and capable official; and there is no reason to suppose that his conduct was not controlled by an honest purpose to do his duty, or that he did not give the signal to "steady" and then to stop to the engineer as soon as the danger of Dean's position became apparent to him.

If the testimony of Tabor, the fireman, and of Ferguson, the engineer, be looked to (and there seems to be no reason why their testimony should not be considered, being in support and contradictory of the statements of Whitworth, who testified on behalf of the defendant in error), then the case is all the stronger for the plaintiff in error, for they show very clearly that the accident was due to no failure of duty upon their part, but that with the light before them they did all that careful and reasonable men could have done to save Dean from the consequences of his own temerity.

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The law upon the facts as here presented is well settled.

In *N. & W. Ry. Co. v. Harman's Adm'r*, 83 Va. 577, 8 S. E. 258, it is said that "if the person seen upon the track is an adult, and apparently in the possession of his or her faculties, the company has a right to presume that he will exercise his senses and remove himself from his dangerous position; and if he fails to do so, and is injured, the fault is his own, and there is, in the absence of willful negligence on its part, no remedy against the company for the results of an injury brought upon him by his own recklessness."

The same doctrine is stated in *Tyler, Receiver, v. Sites*, 90 Va. 539, 19 S. E. 174.

In *Rangeley's Adm'r v. Southern Ry. Co.*, 95 Va. 715, 30 S. E. 386, it is said that a railroad company has the right to assume that a grown person seen on its track will get out of the way of an approaching train, and the company is not liable unless it is shown that after the company, in the exercise of ordinary care, could have discovered that he was not going to get off the track, it could have avoided the injury.

And in *Savage v. Southern Ry. Co.*, 103 Va. 422, 49 S. E. 484, it is said: "It may be that, had the engineer applied the brakes at the moment he came in sight of Savage upon the track, the accident could have been avoided. But such was not his duty. Seeing a man upon the track, in the apparent possession of all his faculties, the engineer had a right to presume that he would exercise reasonable care for his own protection. A step or two would have placed Savage in a position of safety. The duty devolved upon the engineer to stop the train only when he saw that Savage was in danger; that is to say, when he saw, or ought to have seen, that Savage was himself unconscious of his peril and would take no measures for his own protection. This proposition has been decided in numerous cases by this court."

The only witnesses in this case bearing directly upon the point in issue show that the trainmen, in the exercise of their best discretion, measured up to the duty imposed upon them by the law.

We are of opinion, therefore, that the demurrer to evidence should have been sustained, and the judgment of the circuit court must be reversed.

HARTMAN *v.* CHICAGO G. W. Ry. Co.

(Supreme Court of Iowa, Dec. 15, 1906.)

[110 N. W. Rep. 10.]

**Trial—Direction of Verdict—Consideration of Evidence.**—The court, for the purpose of considering a motion to direct a verdict for defendant at the close of plaintiff's case, must regard plaintiff's evidence as establishing every fact which it fairly tends to prove.

**Railroads—Accidents at Crossings—Contributory Negligence—Care Required of Driver—Question for Jury.**—Whether reasonable care requires a traveler on a highway approaching a railway crossing to stop, look, and listen for approaching trains, or whether, having done so, he must stop, look, and listen again, or whether he may place any reliance on an absence of danger signals, or on any other circumstance, are for the jury, except in cases free from doubt.

**Same—Care Required of Company.\***—Though no statutory duty rests on a railway to sound the whistle of its locomotive on approaching a private crossing, it is charged with the common-law duty of taking notice of the location of the crossing; and if, in view of the circumstances, reasonable regard for the safety of persons rightfully using the same required the sounding of the whistle or the ringing of the bell, the failure so to do is negligence.

**Same.**—Where a railway company obstructs the use of a highway crossing, and diverts the travel to a private crossing, the latter must so far be treated as a public crossing as to require the use of statutory signals by approaching trains.

**Same—Negligence—Evidence.**—In an action against a railway company for injuries to a team and other property in a collision with a train at a private crossing, it appeared that the company had obstructed the highway crossing, and had diverted the travel to the private crossing; that it had been in the habit of giving the statutory signals on approaching the crossing, and failed to do so at the time of the collision. Held, that the failure to give the signals was evidence of negligence.

**Same—Speed of Train—Proof of Negligence.†**—No rate of speed in a train moving in the open country is in itself negligence as to a person on a crossing, though it may become a factor, when considered with reference to the circumstances of the particular place, in determining whether due care has been exercised.

**Same—Negligence—Question for Jury.**—In an action against a railway company for injuries to a team and other property in a collision

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\*See foot-notes appended to *Ayers v. Wabash R. Co.* (Mo.), 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; *Wilson's Adm'rs v. Chesapeake & O. Ry. Co.* (Ky.), 16 R. R. R. 103, 39 Am. & Eng. R. Cas., N. S., 103.

†See foot-notes appended to *Hoffard v. Illinois Cent. Ry. Co.* (Iowa), 23 R. R. R. 236, 46 Am. & Eng. R. Cas., N. S., 236.



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with a train at a crossing, evidence examined, and held, that the question of the company's negligence was for the jury.

Appeal from District Court, Chickasaw County; L. E. Fellows, Judge.

Action at law to recover damages for injury to plaintiff's team and other property upon a railway crossing. There was a directed verdict in favor of the defendant, and plaintiff appeals. Reversed.

*Springer, Clary & Condon*, for appellant.

*Smith & O'Connor*, for appellee.

WEAVER, J. The testimony on part of plaintiff tended to show that at a point near the plaintiff's residence a public road intersected the defendant's right of way, but by reason of the excavation for the railway track on the highway at this point was interrupted. To accommodate the travel until an appropriate highway crossing should be constructed, persons using that route were permitted to depart therefrom, and drive along the right of way to the north to a point in the neighboring field where a crossing over the track had been provided, and by that route the other side of the railway. Whether this crossing was a temporary expedient, adopted by the defendant for the use while the regular crossing was impassable, or was constructed as a private crossing for the benefit of the adjacent landowners, is not quite clear in the record. It appears, also, that from the point where travel was diverted from the public road to the crossing in the field the railway passes through a deep cut, and a person driving a team along the path at the top of the cut cannot see trains approaching from the south, but by going to the brink of the cut a view of the track for a considerable distance may be obtained. The evidence of the witnesses is also to the clear effect that for a long time it had been the custom and practice of the defendant's enginemen to sound the whistle on approaching this crossing from the south. On the day in question plaintiff's servant, a man 35 years old, and of considerable experience in handling horses, was driving a team attached to a wagon loaded with three cans of milk in the direction of a creamery located on the opposite side of the railway. Turning in upon the right of way on the east side of the track he drove along the route to the north which we have just described. He testified that, just before reaching that portion of the route where the track was hidden from view, he looked back, and there was no train in sight. Again, before reaching the crossing in the field, he stopped his team to hitch up a tug that had become unhooked, and at this time looked and listened as well as his situation would permit, but neither heard nor saw the approach of a train. He also claims that from this point until he reached the point of collision he continued, to the best of his ability, to look and listen for trains from both directions, and that as he swung his team, which "was prancing and dancing along,"

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in upon the crossing, a train came through the cut from the south at a high rate of speed, striking and killing the horses, and ruining the harness and wagon. Several witnesses concur in the statement that the engine which collided with the team did not sound the whistle for the crossing that morning. We are impressed with the belief that the case thus made was one for the consideration of the jury, and that there was error in directing a verdict. The defendant offered no testimony, and for the purposes of the motion plaintiff was entitled to have taken as established every fact which his evidence fairly tended to prove. Assuming that the driver of the team told the truth (and his credibility was for the jury alone), we cannot say, as a matter of law, that he was himself guilty of negligence contributing to his injury. The rule of "stop, look, and listen" is not of invariable application. It is easy to say and it is a correct proposition that a person approaching a railway crossing must bear in mind that it is a place of danger, and be vigilant to discover the approach of trains, and use reasonable care to avoid injury therefrom; but whether such reasonable care requires him to stop, look, and listen, or whether, having done so, he must stop, look, and listen again, whether he may place any reliance on the absence of danger signals, or upon any other given fact or circumstance, depend so much upon the peculiar conditions by which he is surrounded, that, save in cases exceptionally free from doubt, the question must be left to the answer of the jury. *Selensky v. Railroad*, 120 Iowa, 113, 94 N. W. 272; *Funston v. Railroad*, 61 Iowa, 460, 16 N. W. 518; *Winey v. Railroad*, 92 Iowa, 622, 61 N. W. 218; *Harper v. Bernard*, 99 Iowa, 159, 68 N. W. 599; *Moore v. Railroad*, 102 Iowa, 595, 71 N. W. 569; *Mackerall v. Railroad*, 111 Iowa, 547, 82 N. W. 975; *De Frieze v. Railroad (Iowa)* 94 N. W. 505; *Kuehl v. Railroad*, 126 Iowa, 641, 102 N. W. 512; *Atchison R. R. v. Hague*, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278; *Chaffee v. Railroad*, 104 Mass. 116; *Ernst v. Railroad*, 35 N. Y. 9, 90 Am. Dec. 761; *Newson v. Railroad*, 29 N. Y. 390; *Brown v. Railroad*, 32 N. Y. 597, 88 Am. Dec. 353; *McGrath v. Railroad*, 32 Barb. (N. Y.) 147; *Warren v. Railroad*, 8 Allen (Mass.) 227, 85 Am. Dec. 700; *Fero v. Railroad*, 22 N. Y. 213, 78 Am. Dec. 178; *Keller v. Railroad*, 24 How. Pr. (N. Y.) 177; *Klanowski v. Trunk (Mich.)* 24 N. W. 802; *Railroad Co. v. Wright*, 80 Ind. 182; *Davis v. Railroad*, 47 N. Y. 400; *Strong v. Railroad*, 61 Cal. 326; *R. R. v. Lee*, 87 Ill. 454.

But it is claimed in the case at bar that in any event there was no evidence of negligence on part of defendant, and therefore a verdict in plaintiff's favor could not be upheld. Such is not our conclusion from the record presented. It is true that the crossing upon which the accident occurred was not upon a public highway, and, therefore, if it is to be considered merely as a private crossing, no statutory duty rested upon the defendant to sound the whistle in approaching it. *Nichols v. Railroad Co.*, 125 Iowa, 236, 100 N. W. 1115. Nevertheless, the defendant was charged with the common-law duty to take notice of the location and sur-

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rounding of its private crossings, and if, in view of such circumstances, reasonable regard for the safety of persons rightfully using such crossing required the sounding of the whistle or the ringing of the bell or the use of other proper precaution or warning, then the failure so to do would be negligence. Moreover, where the railway company obstructs and prevents the use of the highway crossing, and thereby knowingly diverts the travel to a private crossing in the same vicinity, we think that, so long as this condition prevails, the latter crossing is to be so far treated as public as to require the use of statutory signals by approaching trains. There is also, as we have before noted, evidence that the defendant company had in fact been in the habit of observing this precaution, and the failure so to do on the morning of the accident, if established, tended materially to sustain the plaintiff's charge of negligence.

The plaintiff also alleges negligence in the speed of the train at the time of the collision. As has often been said, no rate of speed in a train moving in the open country is in itself negligence as to a person upon a crossing, but it sometimes happens, when considered with reference to the circumstances of the particular place, that the rate of speed may be an important factor in determining whether due care has been exercised. *Kinyon v. Railroad*, 118 Iowa, 349, 92 N. W. 40, 96 Am. St. Rep. 382. Whether, in view of the location of this particular crossing at the end of a deep cut, the obstructions, if any, to the view of the approaching traveler, the failure to sound signals of warning, and other attendant circumstances, the rate of speed in this instance had any tendency to indicate a want of reasonable care on part of the defendant was a question of fact and not of law.

Some other questions have been argued by counsel, but in so far as they fairly arise on the record before us they are governed by the conclusions already announced.

For the reasons stated, a new trial must be ordered, and the judgment of the district court is therefore reversed.

RODGER BALLAST CAR CO. *v.* OMAHA, K. C. & E. R. CO. *et al.*

(Circuit Court of Appeals, Eighth Circuit, May 2, 1907.)

[154 Fed. Rep. 629.]

**Railroads—Foreclosure of Railroad Mortgage—Preferred Claim in Equity.\***—A mortgagee of the property acquired and to be acquired and of the income of a quasi public corporation, such as a railroad company, takes a lien on the net income after the current expenses of operation in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these expenses.

**Receivers—Priority of Running Expenses before Receivership.**—A court of equity engaged in administering mortgaged railroad property under a receivership in a foreclosure suit may in its discretion prefer unpaid claims for current expenses incurred in the ordinary operation of the railroad within a limited time, usually six months, before the receivership, to the claims of bondholders secured by a prior mortgage, in the distribution of the income or of the proceeds of the corpus of the mortgaged property.

**Same—Preferential Claim—Test.\***—The test of the equity which entitles a claim to a preference over the mortgage in foreclosure is whether the consideration of the claim was or was not a part of the current expenses of the ordinary operation of the corporation within the time limited.

**Same—Necessity—Conservation—Increase of Security Insufficient.**—Neither the fact that the consideration of the claim conserved the property and increased the security of the mortgagee, nor the fact that it was necessary to keep the mortgagor a going concern or to continue its business or operation, will raise a preferential equity in its favor, if its consideration was not a part of the current expenses of the ordinary operation of the mortgagor.

**Same—Claims for Purchase Price or Rental of Rolling Stock Not Preferential.\***—Claims for the purchase price or for the rental of engines, freight and passenger cars are not entitled to preference in payment out of the income or out of the corpus of the mortgaged property over those of creditors secured by prior mortgages.

**Same—Claim for Purchase Price of Ballast Cars Not Preferential.\***—A claim for \$26,192.05, the purchase price of 32 ballast cars, bought by a mortgagor railroad company operating 168 miles of railroad within six months of the appointment of receivers, is not a current expense of the ordinary operation of such a railroad company, and is not entitled to preference in payment out of the income or the

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\*See foot-note appended to *Mersick v. Hartford, etc., R. Co.* (Conn.), 9 R. R. R. 496, 32 Am. & Eng. R. Cas., N. S., 496; foot-note appended to *Hampton v. Norfolk & W. Ry. Co.* (C. C. A.), 12 R. R. R. 165, 35 Am. & Eng. R. Cas., N. S., 165; *Gregg v. Metropolitan Trust Co.* (U. S.), 17 R. R. R. 695, 40 Am. & Eng. R. Cas., N. S., 695.

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corpus of the mortgaged property in preference to those of bondholders secured by prior mortgages.

The broad language of the dictum in *Fosdick v. Schall*, 99 U. S. 235, 252, 25 L. Ed. 339, that "necessary operating and managing expenses, proper equipment, and useful improvements" are to be deducted from the current income before the net income out of which the mortgage is to be paid arises, has been disapproved and modified, and the class of claims entitled to equitable preference has been limited to those for the current expenses of ordinary operation within six months of the receivership, by the later decisions of the Supreme Court in *Kneeland v. Trust Co.*, 136 U. S. 89, 98, 10 Sup. Ct. 950, 34 L. Ed. 379; *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 196, 198, 11 Sup. Ct. 61, 34 L. Ed. 625; *Thompson v. Railroad Co.*, 132 U. S. 68, 71, 73, 74, 10 Sup. Ct. 29, 33 L. Ed. 256; *Thomas v. Car Co.*, 149 U. S. 95, 110, 13 Sup. Ct. 824, 37 L. Ed. 663; *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 296, 20 Sup. Ct. 347, 44 L. Ed. 458; *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 176 U. S. 298, 315, 20 Sup. Ct. 363, 44 L. Ed. 475, and *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717. See *Illinois Trust & Sav. Bank v. Doud*, 44 C. C. A. 389, 105 Fed. 123, 52 L. R. A. 481.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Western District of Missouri.

*A. S. Van Valkenburgh* and *J. E. McKeighan* (*Frank P. Blair*, *M. F. Watts*, and *J. P. McBaine*, on the brief), for appellant.

*Frank Hagerman* (*Edward C. Wright*, *Hugh C. Ward*, and *J. G. Trimble*, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The question which this appeal presents is whether or not the Rodger Ballast Car Company, a corporation, had a lien superior in equity to those of the bondholders secured by two prior mortgages upon the property of the Omaha, Kansas City & Eastern Railroad Company which were foreclosed in the court below. The question was presented by an intervening petition and was decided after the foreclosure sale. The record is voluminous, but in our view of the facts, all of which have been carefully considered, these alone are material to the determination of the case: The Eastern Railroad Company had a railroad 34 miles in length and a lease of the railroad of the Quincy, Omaha & Kansas City Railroad Company, which was about 134 miles long, and it was operating both of these railroads. In 1896 and 1897 it had given two mortgages upon its railroad, upon its lease, upon its after-acquired property, and upon its income, to secure the payment of bonds to the amount of \$1,428,000. The operation of the Quincy Road was essential to the successful operation and business of the Eastern Company. In 1899 the railroads were in bad condition, more especially the Quincy Road. Miles of its roadbed had been but partially ballasted, the sides of this roadbed

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were washed, many of the cuts upon the road were badly filled, some of the ties were decayed and some of the bridges had become dangerous so that it was necessary to the safe operation of these railroads and to the continuance of the business of the Eastern Company that many miles of this roadbed should be rebalasted and surfaced. The board of railway and warehouse commissioners of the state of Missouri in August, 1899, issued a peremptory order to the Eastern Company, under a possible penalty of the suspension of all traffic upon its roads, that this roadbed must be surfaced and the cuts ditched. Ballast cars were necessary to the performance of this work, and on September 11, 1899, the Eastern Company bought of the Rodger Company 32 ballast cars and one plow car for the sum of \$26,192.05, which it never paid. On January 2, 1900, judgment creditors of the Eastern Company procured the appointment of receivers of the property of that company, including its lease of the Quincy Road, and these receivers took possession of the ballast cars, operated the railroads, expended \$63,000, in ballasting or surfacing the Quincy Road, and paid out \$101,483.52 for rentals, but they paid no part of the purchase price of these cars. On December 16, 1901, the trustees for the holders of the bonds secured by the mortgages first became parties to this proceeding, and they prayed for a foreclosure of the mortgages. A decree to that effect was rendered, and on March 18, 1902, the mortgaged property was sold thereunder. One of the conditions of the sale was that the purchaser should take the property subject to any indebtedness or liability of the Eastern Company which should finally be adjudged prior in lien or superior in equity to the liens of the two mortgages. The controversy here was between the intervening claimant and the purchaser of the property, and the court below held that the claim of the Rodger Company for the purchase price of the cars it sold to the Eastern Company was not prior in lien nor superior in equity to the liens of the bondholders secured by the prior mortgages, and it dismissed its petition. *Fordyce v. Omaha, Kansas City & Eastern R. Co.* (C. C.) 145 Fed. 544.

In *Illinois Trust & Sav. Bank v. Doud*, 44 C. C. A. 389, 414, 705 Fed. 123, 148, 52 L. R. A. 481, this court reviewed with some care the decisions of the Supreme Court prior to the year 1901 upon the right of the unsecured creditor of a quasi public corporation to a preference in the payment of his claim out of the income and out of the corpus of the mortgaged property over creditors secured by prior mortgages, and deduced from them these propositions:

“A mortgagee of the property, acquired and to be acquired, and of the income of a quasi public corporation, such as a railroad company, obtains a lien upon the net income of the company after the current expenses of operation incurred in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these current expenses before the net income to which he is entitled arises.

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property under a receivership in a foreclosure suit may prefer unpaid claims for current expenses of the ordinary operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property.

"If such a mortgagor diverts the current income from the payment of current expenses to the payment of interest on the mortgage debt, or to the improvement of the mortgaged property, so that current expenses remain unpaid when a receiver is appointed, the court may, out of the income accruing during the receivership, restore to the unpaid claims for current expenses the amount so diverted. But, if there has been no diversion, there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion.

"The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver. \* \* \*

"If the consideration of a claim is not a part of the current expenses of the ordinary operation of the mortgaged property, but is a part of the expense of constructing a permanent addition or improvement to it, out of the ordinary course of its operation, neither the fact that it tended to conserve and improve the property and increase the security of the mortgagee, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor pledged or mortgaged the current income to secure it, will give the claim a preferential equity over the lien of a prior mortgage."

An examination of the opinions of the Supreme Court upon this subject since the decision in the Doud Case was rendered discloses no modification of these propositions of law, save that the class of claims which may be preferred has been still farther restricted by the holding in *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, that claims incurred within six months prior to the receivership for the purchase price of cross-ties essential to the replacement of ties decayed in the current operation of a railroad may not be preferred to the claims of bondholders secured by prior mortgages in payment out of the corpus of the mortgaged property in the absence of a diversion of income. It would be a useless task to again review and discuss the numerous opinions of the Supreme Court from which the controlling rules announced in the Doud Case were derived, and an application of them to the facts of this case must suffice.

For the purposes of this decision the concession is made that the purchase of the ballast cars was necessary to keep the Eastern Company a going concern and to continue its business and operation, and that their purchase conserved and improved the mortgaged property and increased the security of the bondholders secured by the mortgages. But neither the fact that the consideration of a claim preserved and improved the mortgaged property

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and increased the security of the mortgagees, nor the fact that it was indispensable to keep the mortgagor a going concern and to continue its operation and business, will give to the claim a preferential equity over the lien of creditors secured by a prior mortgage. *Illinois Trust & Sav. Bank v. Doud*, 44 C. C. A. 415, 105 Fed. 149, 52 L. R. A. 481; *Atlantic Trust Co. v. Dana*, 128 Fed. 209, 227, 62 C. C. A. 675. There is another indispensable attribute of a preferential claim. It is that its consideration was a current expense of the operation of the mortgagor incurred in the ordinary course of its business within a limited time, usually six months, anterior to the appointment of the receiver. *Illinois Trust & Sav. Bank v. Doud*, 44 C. C. A. 407, 408, 414, 415, 105 Fed. 141, 142, 143, 148, 149 (52 L. R. A. 481).

In *Southern Ry. Co. v. Carnegie Steele Co.*, 176 U. S. 257, 259, 296, at page 296, 20 Sup. Ct. 347, at page 362 (44 L. Ed. 458), the Supreme Court said:

"Before, however, such a creditor [an unsecured creditor] is accorded a preference over mortgage creditors in the distribution of net earnings in the hands of a receiver of a railroad company, it should reasonably appear from all the circumstances, including the amount involved and the terms of payment, that the debt was one fairly to be regarded as part of the operating expenses of the railroad incurred in the ordinary course of business, and to be met out of current receipts."

In *Lackawanna, etc., Co. v. Farmers' Loan, etc., Co.*, 176 U. S. 298, 303, 315, 20 Sup. Ct. 363, 44 L. Ed. 475, in which a preference was denied to a claim for the purchase price of a large amount of rails which were indispensable to the continuance of the business of the company and of the operation of its railroad and which conserved the property and increased the security of the mortgagees, that court used these words:

"This court has uniformly held that in the distribution of the current earnings of an insolvent railroad company, whose property is being administered by a receiver, mortgage creditors could not be postponed to unsecured creditors, unless the debts due the latter were of the class known as current debts arising in the ordinary course of business and properly chargeable upon current receipts. The decision in each case has been more or less controlled by its special facts. But we are of opinion that such expenditures as those incurred in the making of the contracts with the Lackawanna Company were not such as are made in the ordinary course of the operations of a railroad, and cannot be deemed current debts within the rule that a railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business, in order to keep it a going concern, shall be paid out of current receipts before he has any claim upon such income."

A current expense incurred in the ordinary course of business within six months prior to a receivership is a usual expense incurred in the customary course of the business of the company. The evidence in this case fails to convince that the purchase of

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these 33 cars for \$26,192.05 by a railroad company operating 168 miles of railroad was the incurring of such an expense. There was no evidence that the company had ever bought such a lot of cars before, or that in the ordinary course of its business it was accustomed to purchase such a lot once in three months or in six months or in any specific number of months, as a part of the current expenses of its operation. On the other hand, the record demonstrates the fact that the expense of this purchase was not a current or a customary, but an unusual expense, that it was not incurred in the ordinary course of the business of the company, but on an extraordinary occasion to answer an unprecedented demand and to provide for an unparalleled situation. For this reason, the debt of the railroad company to the appellant for these cars lacks an indispensable element of a preferential claim, and there was no error in the dismissal of the petition.

There is another established rule upon this subject which argues by analogy for this conclusion. It is that claims for the purchase price or for the rental of engines and cars are not entitled to preference in payment out of the income or out of the corpus of mortgaged property over the claims of creditors secured by prior mortgages. *Illinois Trust & Sav. Bank v. Doud*, 44 C. C. A. 413, 105 Fed. 147, 52 L. R. A. 481; *Fosdick v. Schall*, 99 U. S. 235, 255, 25 L. Ed. 339; *Huidekoper v. Locomotive Works*, 99 U. S. 258, 260, 25 L. Ed. 344; *Kneeland v. Trust Co.*, 136 U. S. 89, 98, 10 Sup. Ct. 950, 34 L. Ed. 379; *Thomas v. Car Co.*, 149 U. S. 95, 110, 111, 112, 13 Sup. Ct. 824, 831, 37 L. Ed. 663, in which the Supreme Court made these pertinent remarks:

“The case of a corporation for the manufacture and sale of cars, dealing with a railroad company whose road is subject to a mortgage securing outstanding bonds, is very different from that of workmen and employees, or of those who furnish from day to day supplies necessary for the maintenance of the railroad. Such a company must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity.”

While ballast cars to move earth along a railroad for the purpose of surfacing and maintaining the roadbed are provided to make it possible for a railroad company to earn its income, while engines, freight cars, and passenger cars are usually obtained for the purpose of directly earning it, the latter are as necessary for the continuance of the business and of the operation of the company, and they contribute as much to increase the security of the mortgagees as the former, and the reasons urged by counsel for the Rodger Company why the same rules should not apply to both have failed to convince.

The decree below must be affirmed; and it is so ordered.

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Interurban railway owes duty to passenger to furnish him safe place to alight, and is not relieved of such duty by knowledge on part of passenger that it had not been discharging the duty. *McGovern v. Interurban Ry. Co. (Iowa)*, 242.

Negligence in inviting passenger to alight at place more hazardous than that at which car might conveniently have been stopped; and duty of interurban railroad to provide passenger platforms at highway crossings. *McGovern v. Interurban Ry. Co. (Iowa)*, 242.

Drafts from windows opened by, or at request of other passengers, liability of carrier on account of. *Louisville & N. R. Co. v. Fisher (C. C. A.)*, 684.

**Ejection.**

Plea alleging rule prohibiting passengers from riding on different street cars of same train without paying fare on each car was not objectionable for failure to show that reasonable accommodations were furnished plaintiff on the car on which he paid his fare. *Birmingham Ry., etc., Co. v. McDonough (Ala.)*, 618.

Plea was not objectionable for failure to aver that plaintiff had knowledge of the rule in question before he boarded car from which he was ejected. *Birmingham Ry., etc., Co. v. McDonough (Ala.)*, 618.

Rule relied on as a defense must be specially pleaded. *Birmingham Ry., etc., Co. v. McDonough (Ala.)*, 618.

**Jars and Jolts.**

Carrier not liable where brakeman in good faith makes unsuccessful attempt to prevent one who had assisted passenger to

**CARRIERS OF PASSENGERS—Continued.**

board train from alighting after it had started, although he might have alighted in safety had the brakeman not interfered. *Chesapeake & O. Ry. Co. v. Paris' Adm'r* (Va.), 626.

Carrier was not relieved from liability on the theory that it owed no duty to the passenger not to accelerate speed of street car before arriving at the stopping place, in order to reach it. *Ranous v. Seattle Elec. Co.* (Wash.), 621.

Operator of street car was bound to know that passengers might act on conductor's signal to stop car and go to platform to alight. *Ranous v. Seattle Elec. Co.* (Wash.), 621.

Street car passenger injured while on platform for purpose of alighting, liability of carrier. *Ranous v. Seattle Elec. Co.* (Wash.), 621.

Liability for injury to holder of special permit to ride in caboose of freight train depends upon where carrier was negligent. *Chicago, B. & Q. Ry. Co. v. Mann* (Neb.), 288.

**Limiting Liability.**

Assumption of risks by persons boarding caboose of freight train at any place where it may be stopped, validity of stipulation in special permits. *Chicago, B. & Q. Ry. Co. v. Mann* (Neb.), 288.

Circus train, validity of contract exempting railroad from liability for injuries to any person using it. *Clough v. Grand Trunk Western Ry. Co.* (C. C. A.), 660.

Overcrowding of cars, negligence in allowing. *Lane v. Choctaw, O. & G. R. Co.* (Okl.), 649.

Person accompanying passengers, not bound to hold train for, where those in charge of train have no actual or constructive notice of his intention to disembark. *Chesapeake & O. Ry. Co. v. Paris' Adm'r* (Va.), 626.

**Pesthouses.**

Breach of contract made between county court and railroad company for purpose of preventing spread of contagious disease, infected passenger's right of action against carrier for. *Jenkins v. Chesapeake & O. Ry. Co.* (W. Va.), 275.

In suit by infected passenger for breach of contract made between county and railroad company, by which latter undertook to transport persons to pesthouse, a declaration which counts as upon a special contract for carriage between plaintiff and the railroad for hire and reward is not supported by proof of a contract between the county court and the railroad, nor by the implied contract between the latter and its passenger, and the variance is fatal. *Jenkins v. Chesapeake & O. Ry. Co.* (W. Va.), 275.

**Presumption of Negligence.**

Instruction, in action for death of passenger in a collision, was erroneous, as relieving plaintiffs from burden of establishing their allegation of negligence in the first instance. *Valente v. Sierra Ry. Co.* (Cal.), 676.

Man by giving his seat to a woman and standing on front platform of car forfeits the advantage of the presumption that an accident to him resulted from carrier's negligence. *Paterson v. Philadelphia Rapid Transit Co.* (Pa.), 665.

Presumption that accident to passenger was caused by carrier's negligence does not embrace gross negligence. *Southern Ry. Co. v. Lee* (Ky.), 285.

**Rules.**

Rule for conduct of carrier's business, reasonableness of, in action for ejection, is question for court. *Birmingham Ry., etc., Co. v. McDonough* (Ala.), 618.

**CARRIERS OF PASSENGERS—Continued.**

Rule prohibiting passenger who had paid fare on one street car of train from passing to the other without again paying fare on that car was enforceable. *Birmingham Ry., etc., Co. v. McDonough* (Ala.), 618.

Rules and regulations as to where passengers may ride must be pleaded by defendant carrier. *Lane v. Choctaw, O. & G. R. Co.* (Okl.), 649.

Rules, care required of carrier with respect to, in order to absolve itself from liability for injuries sustained by passenger while riding in baggage car. *Lane v. Choctaw O. & G. R. Co.* (Okl.), 649.

Rules, carrier responsible for unjust application of reasonable ones, or for enforcing them with undue severity. *Birmingham Ry., etc., Co. v. McDonough* (Ala.), 618.

Rules for conduct of business, common law right of carrier to make. *Birmingham Ry., etc., Co. v. McDonough* (Ala.), 618.

**Who Are Passengers.**

Alighted passenger killed by another train. *Payne v. Illinois Cent. R. Co.* (C. C. A.), 635.

Circus company's employee injured in a collision between two sections of circus train. *Clough v. Grand Trunk Western Ry. Co.* (C. C. A.), 660.

Crossing track after alighting from train. *Atlantic City R. Co. v. Kiefer* (N. J.), 710.

Failing to alight from train at destination to which passenger purchased ticket. *Forbes v. Chicago, etc., Ry. Co.* (Iowa), 714.

Failure to pay fare for child. *Southern Ry. Co. v. Lee* (Ky.), 285.

Holder of special permit riding in caboose of freight train. *Chicago, B. & Q. Ry. Co. v. Mann* (Neb.), 288.

Pass for transportation on employer's street railway, question for jury whether it was issued as one of the terms of servant's employment or as a mere gratuity. *Dugan v. Blue Hill St. Ry. Co.* (Mass.), 159.

Person assaulted by conductor after he had been wrongfully refused a transfer and had alighted from street car. *Blomsness v. Puget Sound Elec. Ry.* (Wash.), 640.

**CATTLE GUARDS.**

See FENCES.

**CHILDREN.****Contributory Negligence.**

Father's contributory negligence in leaving six year old child in custody of her mother, who allowed her unattended to cross railroad tracks, precluded recovery for child's death, in action by father, as administrator, for his sole benefit. *Vinnette v. Northern Pac. Ry. Co.* (Wash.), 779.

Lookout, no duty as to was owing to boy trespasser, while he was playing with apparatus on car on switch within exclusive possession of railroad. *Elliott v. Louisville & N. R. Co.* (Ky.), 20.

Rule that certain fence statute was designed to prevent children, as well as animals, from entering upon railroad tracks is applicable to cattle guards. *Mattes v. Great Northern Ry. Co.* (Minn.), 104.

Turntable causing injury to child, evidence did not justify verdict for plaintiff. *Thompson v. Baltimore & O. R. Co.* (Pa.), 755.

Turntable on railroad's land, not duty to take special precaution with respect to for safety of children. *Thompson v. Baltimore & O. R. Co.* (Pa.), 755.

**COMMON CARRIERS.****Burden of Proof.**

Receipt given by carrier for freight creates presumption that it received the freight directed therein. *Mussellam v. Cincinnati, etc., Ry. Co. (Ky.)*, 293.

Carrier, on having reason to anticipate inability to furnish cars after receipt of notice therefor, must advise shipper, in order to excuse itself from liability for failure to furnish cars. *Di Giorgio, etc., Co. v. Pennsylvania R. Co. (Md.)*, 343.

Carrier was under no obligation to keep some one on watch at the chamber of commerce for the purpose of ascertaining when vessels would arrive, so as to be prepared to furnish cars for transportation of cargoes. *Di Giorgio, etc., Co. v. Pennsylvania R. Co. (Md.)*, 343.

Compliance with statute requiring claim for injury to freight to be filed with agent of the carrier at freight's destination. *Walker v. Southern Ry. Co. (S. Car.)*, 249.

**Conversion.**

Shipper's refusal to receive freight because of delay did not give carrier right to convert it or to dispose of it contrary to law. *Chesapeake & O. Ry. Co. v. Saulsberry (Ky.)*, 727.

**Damages.**

Interest should be allowed on value of lost freight. *Walker v. Southern Ry. Co. (S. Car.)*, 249.

Declaration, in action against carrier for failure to furnish cars, stated caused of action in tort, and not in contract; and recovery must be predicated on liability of carrier, as common carrier, to furnish cars. *Di Giorgio, etc., Co. v. Pennsylvania R. Co. (Md.)*, 343.

**Degree of Care.**

Insurer, termination of carrier's liability as. *United Fruit Co. v. New York & B. Transp. Co. (Md.)*, 690.

**Delay.**

Carrier was not liable for loss sustained by deterioration of goods due to delay in transportation, there being no sufficient notice to furnish cars. *Di Giorgio, etc., Co. v. Pennsylvania R. Co. (Md.)*, 343.

Of a month in transportation of freight a distance of 33 miles renders carrier liable for damages sustained. *Chesapeake & O. Ry. Co. v. Saulsberry (Ky.)*, 727.

Shipper not justified, because of unreasonable delay, to refuse to receive freight. *Chesapeake & O. Ry. Co. v. Saulsberry (Ky.)*, 727.

**Discrimination.**

In rates against shippers of oil in barrels from certain oil fields and in favor of shipments in tank cars owned by shippers who can afford to build and furnish them, when carriers cannot be charged with. *Penn Refining Co. v. Western N. Y. & P. R. Co. (U. S.)*, 208.

Duty of carrier to hold cars for use of a single shipper. *Di Giorgio, etc., Co. v. Pennsylvania R. Co. (Md.)*, 343.

Duty to furnish car adapted to preservation of strawberries. *St. Louis, etc., Ry. Co. v. Renfro (Ark.)*, 253.

Duty to furnish cars for transportation of freight. *Di Giorgio, etc., Co. v. Pennsylvania R. Co. (Md.)*, 343.

**Evidence.**

Bill of lading and waybills were competent evidence against the carrier, in action for loss of freight. *Mussellam v. Cincinnati, etc., Ry. Co. (Ky.)*, 293.

**COMMON CARRIERS—Continued.**

Of the circumstances of the giving of a receipt by the carrier for the freight was admissible to support the defense that the freight had not been delivered to the carrier. *Mussellam v. Cincinnati, etc., Ry. Co. (Ky.)*, 293.

Requisition for cars for another time and for other goods is not admissible. *Di Giorgio, etc., Co. v. Pennsylvania R. Co. (Md.)*, 343.

Requisition on carrier for cars for transportation of goods, when admissible as evidence. *Di Giorgio, etc., Co. v. Pennsylvania R. Co. (Md.)*, 343.

Statements of agent of carrier that part of shipper's freight was missing, and that it would be along in a few days, were competent against the carrier. *Mussellam v. Cincinnati, etc., Ry. Co. (Ky.)*, 293.

That shipper had packed goods of the same description as those in controversy in a similar box was admissible, in action for loss of freight. *Mussellam v. Cincinnati, etc., Ry. Co. (Ky.)*, 293.

That the waybill made at the place where the freight was delivered to the connecting carrier was made out from the waybill which accompanied the car, and not from an inspection of the contents of the car, was admissible to explain how it happened that the connecting carrier receipted for the freight. *Mussellam v. Cincinnati, etc., Ry. Co. (Ky.)*, 293.

**Limiting Liability.**

Express receipt providing that unless a greater value was declared the shipper agreed that the value of the property was not more than \$50, validity of. *DeWolff v. Adams Express Co. (Md.)*, 611.

Removal of goods by consignee, certain period was not reasonable time for. *United Fruit Co. v. New York & B. Transp. Co. (Md.)*, 690.

Removal of goods by consignee, what is reasonable time for. *United Fruit Co. v. New York & B. Transp. Co. (Md.)*, 690.

Rights of carrier under Ky. St. 1903, § 785, authorizing carriers to sell unclaimed freight. *Chesapeake & O. Ry. Co. v. Saulsberry (Ky.)*, 727.

Warehouseman, carrier was liable only as after lapse of certain time after it had given notice of arrival of freight. *United Fruit Co. v. New York & B. Transp. Co. (Md.)*, 690.

Warehouseman, carrier was liable only as, because the freight was held by it beyond the time at which he was ready and had offered to deliver it, pursuant to a contract that it was at risk of the owner during that period. *United Fruit Co. v. New York & B. Transp. Co. (Md.)*, 690.

**CONNECTING CARRIERS.**

See BAGGAGE; INTERSTATE COMMERCE; TICKETS AND FARES.

Application of statute make each carrier the agent of its connecting carrier from whom it receives freight. *Venning v. Atlantic Coast Line R. Co. (S. Car.)*, 666.

Both carriers participating in the shipment were properly joined in one action for damages caused by negligent manner in which the stock in question was handled in transit, though the liability of each carrier was limited to its own line. *Cincinnati, etc., Ry. Co. v. Greening (Ky.)*, 235.

**Burden of Proof.**

Burden is on carrier delivering freight in a damaged condition to show that the damage was done while it was in care of an-



**CONNECTING CARRIERS—Continued.**

other carrier; and such rule is applicable to loss of one horse from car load of horses. *Walker v. Southern Ry. Co. (S. Car.)*, 249.

Presumption that injury to shipment was from negligence of delivering carrier. *St. Louis, etc., Ry. Co. v. Renfroe (Ark.)*, 253.

Carrier could not escape liability for damage to shipment, due to failure to properly ice the car, by showing that the car belonged to another corporation and that under the agreement between it and such corporation the duty of icing the car devolved on latter. *St. Louis, etc., Ry. Co. v. Renfroe (Ark.)*, 253.

Carrier only liable for injuries that occur on its own line. *Cincinnati, etc., Ry. Co. v. Greening (Ky.)*, 235.

Constitutionality of statute making each carrier the agent of its connecting carrier from whom it receives freight, etc. *Venning v. Atlantic Coast Line R. Co. (S. Car.)*, 666.

**Discrimination.**

In rates in favor of shippers of oil in tank cars and against shippers of oil in barrels, when connecting carrier cannot be charged with. *Penn Refining Co. v. Western N. Y. & P. R. Co. (U. S.)*, 208.

Duty of initial carrier to deliver to connecting carrier. *St. Louis & S. F. R. Co. v. McGivney (Okl.)*, 702.

Initial carrier, in absence of special contract, is only bound to carry the freight over its own line and deliver it safely to next connecting carrier. *Roy v. Chesapeake & O. Ry. Co. (W. Va.)*, 230.

Initial carrier's liability for loss of freight in absence of proof tending to show its absence of responsibility. *St. Louis & S. F. R. Co. v. McGivney (Okl.)*, 702.

Initial carrier's liability for loss or injury on other lines, how shown to be created by contract. *Roy v. Chesapeake & O. Ry. Co. (W. Va.)*, 230.

Initial carrier's liability for loss or injury to freight on other lines not created by taking through fare. *Roy v. Chesapeake & O. Ry. Co. (W. Va.)*, 230.

No presumption that goods were injured while in possession of initial carrier. *St. Louis & S. F. R. Co. v. McGivney (Okl.)*, 702.

Passenger injured, street railway, which sold return ticket to point on another railroad with which it connected and ran a car operated by its own crew to point in question, was liable on account of negligence of its employees while car was running on the connecting line. *Moss v. Lancaster, etc., Ry. Co. (Pa.)*, 707.

Presumption that connecting carrier received all packages shipped. *Bradley v. Northwestern R. Co. (S. Car.)*, 700.

Statute giving shipper right to demand of initial carrier proof that loss or injury to freight did not occur on its line does not affect his right, in the first instance, without such demand, to bring action for damages for an alleged loss or injury. *St. Louis & S. F. R. Co. v. McGivney (Okl.)*, 702.

Verdict charging entire damages against each carrier was proper. *Cincinnati, etc., Ry. Co. v. Greening (Ky.)*, 235.

**CONSTITUTIONAL LAW.**

See **CONNECTING CARRIERS; DEATH BY WRONGFUL ACT; INTERSTATE COMMERCE; INTOXICATING LIQUORS; RAILROADS IN STREETS; STREET RAILWAYS.**

Constitutionality of provisions of the act of June 1, 1898, § 10, making it a criminal offense against the United States for an officer or agent of an interstate carrier to discharge an employee from service to such carrier because of his membership in a labor organization. *Adair v. United States (U. S.)*, 22.

**CONTRACTORS.**

See INDEPENDENT CONTRACTORS.

**CONTRIBUTORY NEGLIGENCE.**

See ACCIDENTS ON TRACK; CARRIERS; APPEALS; CHILDREN; MASTER AND SERVANT; NEGLIGENCE.

Burden of proving absence of not sustained by mere legal presumption arising from fact that an ordinarily prudent man would have exercised ordinary care under the circumstances. *Wright v. Boston & M. R. R.* (N. H.), 110.

**Evidence.**

Proof of what men in general would have done under similar circumstances was not admissible. *Wright v. Boston & M. R. R.* (N. H.), 110.

"Last chance" doctrine was properly not embodied in instructions on contributory negligence. *Duteau v. Seattle Elec. Co.* (Wash.), 140.

Perilous alternative adopted in sudden emergency. *McCallion v. Missouri Pac. Co.* (Kan.), 178.

Person placed suddenly and unexpectedly in dangerous position is not guilty of contributory negligence in not adopting the best means of escape. *Maysville, etc., R. Co. v. McCabe's Adm'x* (Ky.), 107.

Proximate cause of injury, one alleged must be shown to be, to bar recovery. *Boney v. Atlantic & N. C. R. Co.* (N. Car.), 609.

Question for jury whether highway traveler must take certain precautions before attempting to cross track; and whether he may rely on absence of danger signals. *Hartman v. Chicago G. W. Ry. Co.* (Iowa), 791.

**CROSSINGS.**

See DEATH BY WRONGFUL ACT; RAILROADS IN STREETS.

Burden of proving negligence. *Wright v. Boston & M. R. R.* (N. H.), 110.

Burden of proving negligence in obstructing street with train, and that such negligence was proximate cause of plaintiff being thrown from vehicle when attempting to turn runaway horse aside. *Duffy v. Atlantic & N. C. R. Co.* (N. Car.), 102.

Complaint was defective for failure to show that deceased was a highway traveler at time he was injured, and, therefore, entitled to ordinary care from railroad. *Chicago, etc., Ry. Co. v. McCandish* (Ind.), 502.

**Contributory Negligence.**

Absence of on part of deceased cannot be established by presenting no evidence on the question and relying upon presumption as to his instinct of self-preservation. *Wright v. Boston & M. R. R.* (N. H.), 110.

Absence of on part of deceased was not shown by the evidence. *Wright v. Boston & M. R. R.* (N. H.), 110.

Allegations of complaint which aver that plaintiff drove upon track, at crossing where watchman was kept, without looking, when he might have done so, do not show affirmatively that he was guilty of contributory negligence. *Southern Ry. Co. v. Stockdon* (Va.), 63.

As driver of wagon must have seen train if he had looked, as he testified he did, he was negligent as matter of law. *Westerkamp v. Chicago, B. & Q. Ry. Co.* (Colo.), 746.

Attempting to cross in front of approaching street car. *Ashley v. Kanawha Valley Traction Co.* (W. Va.), 520.

**CROSSINGS—Continued.**

- Attempting to cross street car track when he sees car approaching. *McQuisten v. Detroit Citizens' St. Ry. Co. (Mich.)*, 122.
- Burden of proving absence of on part of deceased. *Wright v. Boston & M. R. R. (N. H.)*, 110.
- Care required of highway traveler as affected by fact that electric car may lawfully run at higher rate of speed in country than in city. *Phillips v. Washington & R. Ry. Co. (Md.)*, 93.
- Care required of pedestrian at railroad street crossing, instruction was erroneous for not defining. *Southern Ry. Co. v. Winchester's Ex'x (Ky.)*, 736.
- Degree of care required of pedestrian in approaching railroad crossing. *Southern Ry. Co. v. Winchester's Ex'x (Ky.)*, 736.
- Effect of. *Louisville & N. R. Co. v. Wilson (Ky.)*, 44.
- Failure to look where train could have been seen in time. *Phillips v. Washington & R. Ry. Co. (Md.)*, 93.
- Not required to refrain from crossing street car track merely because car is in sight. *Wider v. Detroit United Ry. (Mich.)*, 537.
- Pedestrian or driver struck by street car he should have seen. *Wider v. Detroit United Ry. (Mich.)*, 537.
- Pedestrian struck by street car he saw approaching before he attempted to cross track. *Pittsburgh Ry. Co. v. Cluff (C. C. A.)*, 539.
- Right of highway traveler to assume that speed ordinance will not be violated by trainmen, whether he sees or hears train or not. *Southern Ry. Co. v. Stockdon (Va.)*, 63.
- Struck by street car while crossing track to car going in opposite direction, where he should have seen approaching car. *Fitzgerald v. Boston Elevated Ry. Co. (Mass.)*, 535.
- Sufficiency of evidence of where collision between street car and pedestrian. *Skinner v. Tacoma Ry. & P. Co. (Wash.)*, 499.
- Was proper to instruct that if decedent was placed suddenly in dangerous position by failure of defendant to give reasonable warning of approach of train, or by running it at unlawful speed, he was not guilty of contributory negligence in not adopting best means of escape, etc. *Maysville, etc., R. Co. v. McCabe's Adm'x (Ky.)*, 107.
- Where plaintiff testified that he did not see train which collided with his wagon, he cannot be heard to claim that, in passing over the crossing ahead of the train, he relied on the observance of a speed ordinance. *Westerkamp v. Chicago, B. & Q. Ry. Co. (Colo.)*, 746.
- Contributory negligence of pedestrian in approaching crossing and negligence of trainmen with respect to speed, lookout, and signals, effect of. *Southern Ry. Co. v. Winchester's Ex'x (Ky.)*, 736.
- Duties in running train towards street crossing. *Southern Ry. Co. v. Winchester's Ex'x (Ky.)*, 736.
- Equal rights of street railways and other users of streets. *Ashley v. Kanawha Valley Traction Co. (W. Va.)*, 520.

**Evidence.**

- Other failures to give warning of train's approach to street crossing. *Southern Ry. Co. v. Winchester's Ex'x (Ky.)*, 736.

**Gates.**

- Liability for failure to keep down or give proper warning when trains are passing. *Louisville & N. R. Co. v. Wilson (Ky.)*, 44.
- Liability of railroad for injuries sustained by highway traveler depends upon existence of negligence for which it is responsible, even though he was not guilty of contributory negligence. *Black v. Bessemer, etc., Ry. Co. (Pa.)*, 55.

**CROSSINGS—Continued.****Lookouts.**

- Inference of failure of engineer to keep was not justified, under the circumstances, by fact of his failure to stop train or give signals. *St. Louis & S. F. Ry. Co. v. Ferrell* (Ark.), 742.
- More care required of street railways at crossings. *Ashley v. Kanawha Valley Traction Co.* (W. Va.), 520.
- Mutual rights of highway traveler and railroad. *Duffy v. Atlantic & N. C. R. Co.* (N. Car.), 102.
- Negligence in obstructing street with train. *Duffy v. Atlantic & N. C. R. Co.* (N. Car.), 102.
- Negligent speed of train immaterial where proximate cause of accident was pedestrian's fall upon track. *St. Louis & S. F. Ry. Co. v. Ferrell* (Ark.), 742.
- Railroad employees are required to exercise ordinary care for safety of travelers while using grade highway crossing, but such employees are only required not to willfully injure trespassers or mere licensees thereon. *Chicago, etc., Ry. Co. v. McCandish* (Ind.), 502.

**Signals.**

- Action for death of pedestrian cannot be based on failure to give signals where he knew of train's approach before he attempted to cross track. *St. Louis & S. F. Ry. Co. v. Ferrell* (Ark.), 742.
- Additional precautions required when train is approaching dangerous and much used street crossing. *Southern Ry. Co. v. Winchester's Ex'x* (Ky.), 736.
- Care required at much traveled highway crossing. *Crane v. Pennsylvania R. Co.* (Pa.), 773.
- Negative testimony was insufficient to create a substantial conflict of evidence on question as to whether signals were given. *Rich v. Chicago, etc., Ry. Co.* (C. C. A.), 1.
- Overhead crossings. *Black v. Bessemer, etc., R. Co.* (Pa.), 55.
- Positive and negative testimony creating question for jury. *Chesapeake & O. Ry. Co. v. Nipp's Adm'x* (Ky.), 150.
- Private crossings. *Hoback's Adm'r v. Louisville, etc., Ry. Co.* (Ky.), 8.
- Private crossings, care required at. *Hartman v. Chicago G. W. Ry. Co.* (Iowa), 791.
- Private crossings, care required at where railroad has obstructed public crossing and diverted travel. *Hartman v. Chicago G. W. Ry. Co.* (Iowa), 791.
- Private crossings, failure to give signals for was evidence of negligence. *Hartman v. Chicago G. W. Ry. Co.* (Iowa), 791.
- Question for jury where conflict of evidence as to whether train bell was rung. *Crane v. Pennsylvania R. Co.* (Pa.), 773.
- Question for jury whether adequate notice of approach of train to street crossing was given. *Southern Ry. Co. v. Winchester's Ex'x* (Ky.), 736.
- Street railways. *Ashley v. Kanawha Valley Traction Co.* (W. Va.), 520.
- Trespasser injured near crossing can base no right of action upon failure to give crossing signals. *Chesapeake & O. Ry. Co. v. Nipp's Adm'x* (Ky.), 150.

**Signboards.**

- Maintenance by street railway of sign over tracks, requiring cars to "run slow" at such point, created a duty as to such members of the public as would be likely to be injured by failure to observe the precaution thus prescribed. *Hayward v. North Jersey St. Ry. Co.* (N. J.), 11.

**CROSSINGS—Continued.****Speed.**

Care required at much traveled highway crossing. *Crane v. Pennsylvania R. Co. (Pa.)*, 773.

Complaint, sufficiency of as affected by absence of allegation that violation of certain speed ordinance, if valid, was proximate cause of plaintiff's injury. *Southern Ry. Co. v. Stockdon (Va.)*, 63.

Complaint, sufficiency of as affected by fact of constitutionality of speed ordinance alleged to have been violated by defendant. *Southern Ry. Co. v. Stockdon (Va.)*, 63.

In country as negligence. *Phillips v. Washington & R. Ry. Co. (Md.)*, 93.

Of street cars as negligence. *Ashley v. Kanawha Valley Traction Co. (W. Va.)*, 520.

Of street cars as negligence in absence of statutory requirements. *Skinner v. Tacoma Ry. & P. Co. (Wash.)*, 499.

Of train at crossing as negligence. *Hartman v. Chicago G. W. Ry. Co. (Iowa)*, 791.

Ordinance limiting speed, admissibility of as evidence. *Southern Ry. Co. v. Stockdon (Va.)*, 63.

Violation of speed ordinance by street railway as negligence. *Ashley v. Kanawha Valley Traction Co. (W. Va.)*, 520.

**Stop, Look, and Listen.**

Contributory negligence is question for jury where evidence is conflicting as to whether deceased stopped, looked and listened. *Crane v. Pennsylvania R. Co. (Pa.)*, 773.

Failure to look and listen at crossing where railroad keeps watchman, when crossing gates are up, is not negligence per se. *Louisville & N. R. Co. v. Wilson (Ky.)*, 44.

Failure to look a second time, just as he was about to drive on track, for street car, which approached at unlawful speed. *Wider v. Detroit United Ry. (Mich.)*, 537.

Rule not applicable to street railway crossings. *Niemyer v. Washington Water Power Co. (Wash.)*, 496.

Variance where plaintiff's injuries are alleged to have been received while he was passing over the crossing and it is shown that he was injured while alighting from freight train. *Louisville & N. R. Co. v. Wilson (Ky.)*, 44.

**Watchmen.**

Question for jury whether watchman gave proper warning. *Southern Ry. Co. v. Stockdon (Va.)*, 63.

**DAMAGES.**

See APPEALS; CARRIERS; CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; STREET RAILWAYS.

Measure of, duty to instruct as to. *Central of Georgia Ry. Co. v. Hughes (Ga.)*, 62.

Refusal of trial court to set aside verdict as excessive is not reviewable. *Boney v. Atlantic & N. C. R. Co. (N. Car.)*, 609.

Trial court's power to set aside verdict as excessive. *Boney v. Atlantic & N. C. R. Co. (N. Car.)*, 609.

**DEATH BY WRONGFUL ACT.****Contributory Negligence.**

Habits of deceased, admissibility of evidence of. *Chicago & A. R. Co. v. Wilson (Ill.)*, 97.

Presumption of exercise of due care for his own safety by deceased. *Rich v. Chicago, etc., Ry. Co. (C. C. A.)*, 1.

When absence of evidence of what deceased did at time of ac-

**DEATH BY WRONGFUL ACT—Continued.**

cident at crossing cannot be supplied by conjecture or by the theory that instinct of self-preservation was evidence that his conduct was that of an ordinarily prudent person. *Wright v. Boston & M. R. R.* (N. H.), 110.

**Damages.**

Constitutionality of statute permitting recovery of exemplary damages on account of recklessness, wantonness or malice. *Hull v. Seaboard Air Line Ry.* (S. Car.), 281.

Husband's right to recover for loss of time and funeral expenses resulting from death of wife. *Philby v. Northern Pac. Ry. Co.* (Wash.), 485.

**Evidence.**

Life expectancy of beneficiaries as shown by life tables. *Valente v. Sierra Ry. Co.* (Cal.), 676.

**EMINENT DOMAIN.**

See STREET RAILWAYS; WATER AND WATERCOURSES.

**Benefits.**

Mere increase in facilities of transportation does not amount to special benefit. *Mantorville Ry. & Transfer Co. v. Slingerland* (Minn.), 540.

Right to set off special benefits in proceedings to condemn right of way for railroad. *Mantorville Ry. & Transfer Co. v. Slingerland* (Minn.), 540.

Special benefits may be conferred upon property by an improvement, though such benefits are shared by other property. *Eldorado, etc., Ry. Co. v. Everett* (Ill.), 362.

Special benefits, meaning of term as used in proceedings to condemn right of way for railroad. *Mantorville Ry. & Transfer Co. v. Slingerland* (Minn.), 540.

Special benefits to be set off in proceedings to condemn right of way for railroad, definitions of. *Mantorville Ry. & Transfer Co. v. Slingerland* (Minn.), 540.

Usual beneficial results of the mutually advantageous arrangement between the state and railroad are not special benefits. *Mantorville Ry. & Transfer Co. v. Slingerland* (Minn.), 540.

**Damages.**

Additional railroad tracks, not contemplated when right of way was secured. *Louisville & N. R. Co. v. Scomp* (Ky.), 381.

Cutting of fields into inconvenient shapes, interruption of convenient ways for animals to and from pasture and necessity for additional fencing are elements of damages from condemnation of land for railroad right of way. *New Jersey, etc., R. Co. v. Tutt* (Ind.), 367.

Damages from condemnation of property for railroad right of way must all relate to time of filing of condemnation complaint. *New Jersey, etc., R. Co. v. Tutt* (Ind.), 367.

Danger from fire from locomotives. *New Jersey, etc., R. Co. v. Tutt* (Ind.), 367.

Danger of fire from locomotives. *Eldorado, etc., Ry. Co. v. Everett* (Ill.), 362.

Danger to persons or stock from construction and operation of trolley line. *Indianapolis & C. T. Co. v. Larrabee* (Ind.), 376.

Full damages should be paid where private property is taken for railroad right of way. *Colorado, etc., R. Co. v. Boagni* (La.), 573.

Presumption that railroad will exercise all its legal rights with respect to property sought to be condemned. *New Jersey, etc., Ry. Co. v. Tutt* (Ind.), 367.



**EMINENT DOMAIN—Continued.**

- Was error to charge that incidental injuries resulting from perpetual use of track for moving trains should be considered. Eldorado, etc., Ry. Co. *v.* Everett (Ill.), 362.
- Drainage ditch is not a water course, which railroad is required to restore to its former state by Burns, Ann. St. 1901, § 5153. New Jersey, etc., R. Co. *v.* Tutt (Ind.), 367.
- Duty of railroad to restore ditch for drainage of surface water across its right of way. New Jersey, etc., R. Co. *v.* Tutt (Ind.), 367.

**Evidence.**

- Value of land, sales of other property to show. Eldorado, etc., Ry. Co. *v.* Everett (Ill.), 362.
- Value of property, evidence as to what railroad paid for right of way across another tract of land to show. Eldorado, etc., Ry. Co. *v.* Everett (Ill.), 362.
- Was competent to ask witness whether he knew of any farm which was depreciated in value by reason of railroad going across it, like the one in question, or any farm that sold or would sell for less on that account. Eldorado, etc., Ry. Co. *v.* Everett (Ill.), 362.
- Jury composed of farmers, qualification of to deal with question of compensation, where it is sought to condemn right of way for railroad. Colorado, etc., Ry. Co. *v.* Boagni (La.), 573.
- Right of one railroad to condemn lands of another. State *v.* Superior Court (Wash.), 353.
- Selection of route for railroad, right is not subject to judicial control. Colorado, etc., R. Co. *v.* Boagni (La.), 573.

**EMPLOYEES OF OTHER COMPANIES.**

See NEGLIGENCE.

**EMPLOYERS' LIABILITY ACTS.**

See CONSTITUTIONAL LAW; FELLOW SERVANTS.

- Application of Act. Ind. March 4, 1893. Louisville & N. R. Co. *v.* Melton (Ky.), 585.

**Assumption of Risk.**

- Under N. Car. Revisal 1905, § 2646, denying defenses of assumption of risk where an employee is injured by any defect in machinery, nonsuit, in an action by a servant for injuries resulting from a defective handcar on which he was riding, is properly refused. Boney *v.* Atlantic & N. C. R. Co. (N. Car.), 609.

**Blacklisting.**

- Constitutionality of Minn. Rev. Laws 1905, § 5097, declaring it unlawful for two or more employers of labor to combine or confer together for purpose of preventing any person from procuring employment. Joyce *v.* Great Northern Ry. Co. (Minn.), 182.
- Interference with employment in violation of Minn. Rev. Laws 1905, § 5097. Joyce *v.* Great Northern Ry. Co. (Minn.), 182.
- Interference with employment in violation of Minn. Rev. Laws 1905, § 5097. Joyce *v.* Great Northern Ry. Co. (Minn.), 182.
- Malice essential to give rise to cause of action under Minn. Rev. Laws, 1905, § 5097. Joyce *v.* Great Northern Ry. Co. (Minn.), 182.
- Burden of proof upon carrier to bring itself within exception in favor of four-wheeled cars which is made by proviso in § 6 of federal automatic coupler act of March 2, 1893. Schlemmer *v.* Buffalo, etc., R. Co. (U. S.), 190.
- Cause of action accruing under Act. Ind. March 4, 1893, will be en-

**EMPLOYERS' LIABILITY ACTS—Continued.**

- forced in Kentucky, even though the courts of Indiana would not enforce a cause of action accruing in Kentucky. *Louisville & N. R. Co. v. Melton* (Ky.), 585.
- Complaint showed that injuries in question were caused by negligence of engineer while acting within his capacity as superintendent, within Ala. Code 1896, § 1749, Subd. 2. *Creola Lumber Co. v. Mills* (Ala.), 395.
- Constitutionality of Act. Ind. March 4, 1893. *Louisville & N. R. Co. v. Melton* (Ky.), 585.
- N. Car. Revisal 1905, § 2646, applies to a manufacturer operating in connection with his plant a private railroad. *Hairston v. United States Leather Co.* (N. Car.), 595.
- Risk of injury attending removal from track of hand car is peculiar to the "operation of railroads," within Wis. Rev. St. 1898, § 1816, as amended by laws 1903, p. 741, c. 448. *Hardt v. Chicago, etc., Ry. Co.* (Wis.), 468.
- Shovel car is a "car," within meaning of federal automatic coupler act. *Schlemmer v. Buffalo, etc., R. Co.* (U. S.), 190.
- Sufficiency of complaint based on Ala. Code, 1896, § 1749, subd. 3, making an employer liable for injuries to an employee caused by negligence of co-employee, to whose orders such employee at time of the injury was bound to and did conform. *Creola Lumber Co. v. Mills* (Ala.), 395.
- Under N. Car. Revisal 1905, § 2646, any servant of a railroad company sustaining injury by negligence of any other servant of the company is entitled to maintain action against the company. *Britt v. Carolina N. R. Co.* (N. Car.), 453.
- Yard foreman was an employee "engaged in service requiring his presence" on an engine, within Va. Const., § 162 abolishing in certain cases the fellow servant doctrine. *Southern Ry. Co. v. Smith* (Va.), 579.

**EVIDENCE.**

- See BAGGAGE; BILLS OF LADING; CARRIERS; CONTRIBUTORY NEGLIGENCE; CROSSINGS; DEATH BY WRONGFUL ACT; FIRES SET BY LOCOMOTIVES; NEGLIGENCE; RAILROADS; STREET RAILWAYS; TICKETS AND FARES; WITNESSES.
- Agent's declarations. *Matteson v. New York Cent., etc., Co.* (Pa.), 751.

**Expert Testimony.**

- Safe rate of speed for street car. *Ford's Adm'r v. Paducah City Ry.* (Ky.), 529.
- Mortality tables, admission of without proof of authority. *Valente v. Sierra Ry. Co.* (Cal.), 676.

**Opinion Evidence.**

- Non-expert opinion upon facts testified to by other witnesses. *Gracy v. Atlantic Coast Line R. Co.* (Fla.), 508.
- Testimony as to examination of locus in quo. *Hull v. Seaboard Air Line Ry.* (S. Car.), 281.

**EXPRESS COMPANIES.**

See COMMON CARRIERS.

**EXPRESS MESSENGERS.**

See LICENSEES.

**FEDERAL JURISDICTION.**

- Decision in state court on non-federal ground. *Schlemmer v. Buffalo, etc., R. Co.* (U. S.) 190.
- Removal of cause of action against railroad and its train dispatcher and others, immaterial that train dispatcher was joined for sole purpose of preventing removal to federal court. *Hough v. Southern Ry. Co.* (N. Car.), 759.

**FELLOW SERVANTS.**

See EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANT.

Bystander and station agent, who calls him in to assist in rolling cars away from fire. *Jackson v. Southern Ry. (S. Car.)*, 769.

Definition of. *Southern Ry. Co. v. Smith (Va.)*, 579.

Employee directing gang engaged in loading iron rails on flat car was vice principal, though he had no power to employ or discharge the men. *Chicago, etc., Ry. Co. v. Rathneau (Ill.)*, 202.

Engineer was fellow servant of locomotive cleaner; and latter could not recover on account for former's failure to report defects in engine. *Sage v. Baltimore & O. R. Co. (Pa.)*, 591.

Flagman and engineer. *Lyon v. Charleston & W. C. Ry. (S. Car.)*, 443.

Incompetency of fellow servant, liability of master an account of. *Jackson v. Southern Ry. (S. Car.)*, 769.

Instruction that, where master confers authority on an employee to control workmen in carrying on a particular work, the employee, in directing the movements of the men, is a vice principal, was not erroneous under the evidence in question. *Chicago, etc., R. Co. v. Rathneau (Ill.)*, 202.

Yard foreman was fellow servant of yard engineer, within Va. Const., § 162. *Southern Ry. Co. v. Smith (Va.)*, 579.

**FENCES.**

See CHILDREN; STOCK, INJURIES TO.

Degree of care required in maintaining railroad right of way fence. *Coe v. Northern Pac. Ry. Co. (Minn.)*, 734.

Obligation to construct railroad right of way fence is absolute, but, when once constructed in compliance with law, only reasonable care in maintaining it is required. *Coe v. Northern Pac. Ry. Co. (Minn.)*, 734.

Question for jury whether railroad's shop yards could be fenced without materially impairing their usefulness. *Mattes v. Great Northern Ry. Co. (Minn.)*, 104.

Shop yards of railroad, application of fence statute. *Mattes v. Great Northern Ry. Co. (Minn.)*, 104.

Under certain Illinois statute, a railroad, not being required to fence its right of way where right of way of another railroad crosses it, must construct cattle guards and wire fences without reference to whether the other road maintains fences and cattle guards or not. *Illinois Cent. R. Co. v. Davidson (Ill.)*, 51.

**FENDERS.**

See STREET RAILWAYS.

**FIRES SET BY LOCOMOTIVES.**

Assumption of risks by those who establish themselves near railroads. *Gracy v. Atlantic Coast Line R. Co. (Fla.)*, 508.

Correctness of charge that "a railroad company, free from negligence, is not liable for damages from fire kindled by sparks or clinkers from locomotives." *Gracy v. Atlantic Coast Line R. Co. (Fla.)*, 508.

Correctness of instruction that "the jury are not permitted to infer or presume, for want of positive truths to the contrary, that the fire was communicated by the operation of a railroad." *Gracy v. Atlantic Coast Line R. Co. (Fla.)*, 508.

Degree of care due from railroad to property owners. *Gracy v. Atlantic Coast Line R. Co. (Fla.)*, 508.

Equipment of locomotive and its proper operation as a complete defense. *Chesapeake & O. R. Co. v. Richardson (Ky.)*, 506.

**Evidence.**

Other fires and cinders from other engines. *Chesapeake & O. R. Co. v. Richardson (Ky.)*, 506.

**FIRES SET BY LOCOMOTIVES**—Continued.

Negligence, sufficiency of evidence of where it appeared that the burned house was 100 feet from track and that locomotives equipped with same kind of screens had thrown out large cinders and set the house on fire a day or two before. *Chesapeake & O. R. Co. v. Richardson* (Ky.), 506.

**FRANCHISES.**

See **STREET RAILWAYS.**

**FREE PASS.**

See **CARRIERS OF PASSENGERS; TICKETS AND FARES.**

**FRIGHTENING TEAMS.**

Duty of motorman to slacken speed of car, or to stop it, upon seeing that frightened horse is likely to back buggy upon track. *South Covington, etc., Ry. Co. v. Cleveland* (Ky.), 143.

Ordinary operation of train frightening team, liability of railroad on account of. *Clinebell v. Chicago, B. & Q. R. Co.* (Neb.), 59.

**GATES.**

See **CROSSINGS.**

**HUSBAND AND WIFE.**

See **DEATH BY WRONGFUL ACT.**

**INJUNCTIONS.**

See **STREET RAILWAYS.**

**INSOLVENCY.****Preferential Claims.**

Conservation of mortgaged property and increase of security.

*Rodger Ballast Car Co. v. Omaha, etc., R. Co.* (C. C. A.), 795.

Current expenses of operation of railroad. *Rodger Ballast Car Co. v. Omaha, etc., R. Co.* (C. C. A.), 795.

*Fosdick v. Schall*, language of dictum in disapproved. *Rodger v. Ballast Car Co. v. Omaha, etc., R. Co.* (C. C. A.), 795.

Price of ballast cars for mortgaged railroad. *Rodger Ballast Car Co. v. Omaha, etc., R. Co.* (C. C. A.), 795.

Price or rental of rolling stock for mortgaged railroad. *Rodger Ballast Car v. Omaha, etc., R. Co.* (C. C. A.), 795.

Running expenses incurred prior to receivership, in suit to foreclose railroad mortgage. *Rodger Ballast Car Co. v. Omaha, etc., R. Co.* (C. C. A.), 795.

Test of right to priority over railroad mortgage. *Rodger Ballast Car Co. v. Omaha, etc., R. Co.* (C. C. A.), 795.

**INSTRUCTIONS.**

See **FENCES.**

**INTERSTATE COMMERCE.**

See **COMMON CARRIERS; CONNECTING CARRIERS; CONSTITUTIONAL LAW; INTOXICATING LIQUORS.**

No such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent or officer of an interstate carrier to discharge an employee from service to such carrier because of such membership on his part. *Adair v. United States* (U. S.), 22.

Statute making each carrier the agent of its connecting carrier from whom it receives freight, etc., is an infringement of the interstate commerce clause of the federal constitution. *Venning v. Atlantic Coast Line R. Co.* (S. Car.), 666.

**INTERSTATE COMMERCE—Continued.**

24 S. Car. St. at Large, p. 1, providing penalty for failure to pay loss or damage in a given time, applies only to loss or damage to freight occurring on line of carrier sued in the state. *Venning v. Atlantic Coast Line R. Co. (S. Car.)*, 666.

**INTOXICATING LIQUORS.**

Certain act was within Ky. Acts, 1906, p. 320, c. 63, declaring it unlawful for a common carrier to bring into or deliver in any county, etc., where the sale of intoxicating liquor is prohibited, any intoxicating liquor. *Cincinnati, etc., R. Co. v. Commonwealth (Ky.)*, 632.

Constitutionality of Ky. Acts, 1906, p. 320, c. 63, which undertakes to impede, burden, or regulate the bringing of intoxicating liquors by carriers into the state. *Cincinnati, etc., R. Co. v. Commonwealth (Ky.)*, 632.

That liquor was taken from a point in Kentucky to a point outside that state, and from there shipped back to a consignee in Kentucky, for the purpose of evading the local option law of Kentucky, did not, as against the carrier, render such shipment to state regulation, as not being interstate commerce. *Cincinnati, etc., R. Co. v. Commonwealth (Ky.)*, 632.

Whether carrier knew that commodity presented for transportation from one state to another was malt liquor, or that the point to which it was shipped was in a local option district, is immaterial as affecting the liability of such shipment to state regulation. *Cincinnati, etc., R. Co. v. Commonwealth (Ky.)*, 632.

**JOINT LIABILITY.**

See MASTER AND SERVANT; NEGLIGENCE.

**JUDICIAL NOTICE.**

Mortality tables. *Valente v. Sierra Ry. Co. (Cal.)*, 676.

**JURISDICTION.**

See APPEALS; FEDERAL JURISDICTION.

**LABOR ORGANIZATIONS.**

See CONSTITUTIONAL LAW; INTERSTATE COMMERCE.

**"LAST CLEAR CHANCE."**

See CONTRIBUTORY NEGLIGENCE.

**LAST CLEAR CHANCE DOCTRINE.**

See ACCIDENTS ON TRACK; CROSSINGS; NEGLIGENCE.

**LEASES AND RUNNING POWERS.**

See STOCK, INJURIES TO.

Lessor and lessee both sued for negligence of lessee, nonsuit should not be granted to lessor, unless also granted to lessee. *Jackson v. Southern Ry. (S. Car.)*, 769.

Railroad company cannot escape liability for negligence in management of railroad and its affairs by any contract with a lessee. *Illinois Cent. R. Co. v. Lucas (Miss.)*, 41.

**LICENSEES.**

See CARRIERS OF LIVE STOCK; CROSSINGS; STATIONS AND DEPOTS.

**Carriers of Live Stock.**

Care due from railroad to licensees on its tracks. *Norfolk & W. Ry. Co. v. Denny's Adm'x (Va.)*, 124.

**Contributory Negligence.**

Licensees' duty to look and listen for approach of trains from rear, as well as from in front. *Norfolk & W. Ry. Co. v. Denny's Adm'x (Va.)*, 124.

**LICENSEES—Continued.**

- Right to use railroad yard as passage way did not relieve decedent from obligation to use ordinary care for his own safety. *Rich v. Chicago, etc., Ry. Co. (C. C. A.)*, 1.
- Degree of care due persons using track by implied permission of railroad. *Frye v. St. Louis, etc., Ry. Co. (Mo.)*, 73.
- Invitation to contractor's employees to use railroad track as footpath, sufficiency of evidence to warrant instruction on. *Norfolk & W. Ry. Co. v. Denny's Adm'x (Va.)*, 124.
- Liability of railroad for injury to servant of shipper, sustained while he was securing turntable upon car, through negligence of railroad's employee in permitting a hook, which attached a derrick to the turntable and held latter temporarily in position, to become unhooked, by reason of which plaintiff was injured. *Urbanneck v. Pennsylvania R. Co. (N. J.)*, 483.
- Lookouts on train, railroad owes licensees on track no duty to keep. *Norfolk & W. Ry. Co. v. Denny's Adm'x (Va.)*, 124.
- Negligence in backing train at night without light or signals or other means to warn quarantine guard on defendant's track, at his post of duty. *Louisville & N. R. Co. v. Goulding (Fla.)*, 155.
- Person at railroad station, while circus is being unloaded, to transact business with circus manager, was a mere licensee; and the railroad, having been guilty of no willful wrong with reference to her, was not liable for injuries sustained by her through negligence of circus people while unloading circus train. *Illinois Cent. R. Co. v. Lucas (Miss.)*, 41.
- Rule that implied acquiescence in use of track at certain point by public imposes upon railroad duty to give warning and to keep lookout is applicable only to cities or thickly populated communities. *Chesapeake & O. Ry. Co. v. Nipp's Adm'x (Ky.)*, 150.
- Trespasser upon railroad tracks, quarantine guard was not as matter of law. *Louisville & N. R. Co. v. Goulding (Fla.)*, 155.

**LIMITING LIABILITY.**

See **BILLS OF LADING; CARRIERS; MASTER AND SERVANT; TICKETS AND FARES.**

**LOCAL ASSESSMENTS.**

See **TAXATION.**

**MASTER AND SERVANT.**

- See **ACCIDENTS ON TRACK; AGENCY; CONSTITUTIONAL LAW; EMPLOYERS' LIABILITY ACTS; FEDERAL JURISDICTION; FELLOW SERVANTS; INDEPENDENT CONTRACTORS; INTERSTATE COMMERCE; LICENSEES; NEGLIGENCE.**
- Act of foreman of section crew in lifting hand car from track was negligent because not in accordance with custom. *Hardt v. Chicago, etc., Ry. Co. (Wis.)*, 468.

**Appliances.**

- Automatic couplers, failure of owner of private railroad to equip cars used on such road with was negligence. *Hairston v. United States Leather Co. (N. Car.)*, 595.
- Degree of care required of master in furnishing and maintaining. *Kentucky & Ind. B. & R. Co. v. Morgan (Ind.)*, 437.
- Duty of master to furnish suitable appliances. *St. Louis, etc., Ry. Co. v. Inman (Ark.)*, 433.
- Failure of railroad to have cars equipped with air brakes operated from engine, as required by act of Congress, to constitute actionable negligence with respect to an employee of the company, must have been proximate cause of his injury. *Lyon v. Charleston & W. C. Ry. (S. Car.)*, 443.



**MASTER AND SERVANT—Continued.**

Negligence in maintaining defective coupling appliance, sufficiency of petition. *Wabash R. Co. v. Kithcart* (C. C. A.), 167.

Negligence in requiring roundhouse employee to work with defective engine. *Barschow v. Lake Shore & M. S. Ry. Co.* (Mich.), 430.

No actionable negligence on part of master of injured employee was alleged in complaint; it not being charged that the master had knowledge of the defect in question a sufficient length of time to have repaired it. *Kentucky & Ind. B. & R. Co. v. Morgan* (Ind.), 437.

Where employee refused to use tools furnished him by master, and procured tools which seemed to him to be more convenient, by which he was injured, he was not entitled to claim that his employer was negligent in failing to furnish him with safe tools. *Denver & R. G. R. Co. v. Sporleder* (Colo.), 404.

**Assumption of Risk.**

Automatic couplers, failure of master to comply with federal act of March 2, 1893, § 2. *Schlemmer v. Buffalo, etc., R. Co.* (U. S.), 190.

Automatic couplers, failure to equip cars with. *Hairston v. United States Leather Co.* (N. Car.), 595.

Brakeman struck by switch target and knocked from moving car while climbing side ladder. *Boston & M. R. Co. v. Gokey* (C. C. A.), 477.

Burden on injured conductor of proving that he did not know danger from the defective ties in question. *Dunbar v. Central Vt. R. Co.* (Vt.), 413.

Conductor injured by derailment of his train in consequence of unsoundness of ties. *Dunbar v. Central Vt. R. Co.* (Vt.), 413.

Continuing to ride on defective hand car after injured servant's superior had repeatedly promised to furnish another. *Boney v. Atlantic & N. C. R. Co.* (N. Car.), 609.

Continuing to work relying on promise to repair defect. *Britt v. Carolina N. R. Co.* (N. Car.), 453.

Continuing to work with knowledge of dangerous character of employment, and without making protest. *Denver & R. G. R. Co. v. Sporleder* (Colo.), 404.

Contract of employment did not require injured employee to discover defective condition of pilot of engine on which he was riding when injured. *Barschow v. Lake Shore & M. S. Ry. Co.* (Mich.), 430.

Danger to brakeman in boarding moving locomotive in order to sand track. *Creola Lumber Co. v. Mills* (Ala.), 395.

Defective rail in railroad track. *Shanks v. Central Vermont R. Co.* (Vt.), 423.

Duty of servant to inform himself of ordinary risks of employment. *Choctaw, O. & G. R. Co. v. Thompson* (Ark.), 417.

Employee injured by hand car while helping to shove it upon main track with unnecessary force. *St. Louis, S. W. Ry. Co. v. Brisco* (Tex.), 408.

Evidence that a large per cent. of derailments could not be accounted for nor guarded against was inadmissible where ordinary risks of business were assumed by the injured conductor. *Dunbar v. Central Vt. R. Co.* (Vt.), 413.

Members of hand car crew did not, as matter of law, assume risk of injury from unusual method adopted by their foreman to assist them in removing car from track. *Hardt v. Chicago, etc., Ry. Co.* (Wis.), 468.

Obeying order of foreman, question for jury. *Chicago, etc., Ry. Co. v. Rathneau* (Ill.), 202.

Obeying order to do hazardous work. *Chicago, etc., Ry. Co. v. Rathneau* (Ill.), 202.

**MASTER AND SERVANT—Continued.**

Obvious danger to track laborers from approaching trains.

*Precodnick v. Lehigh Valley R. Co.* (N. J.), 426.

Riding on pilot of engine in ignorance that it was unusually low. *Barschow v. Lake Shore & M. S. Ry. Co.* (Mich.), 430.

Risks not within scope of servant's employment contract, what are. *Lyon v. Charleston & W. C. Ry.* (S. Car.), 443.

Servant injured by reason of derailment of hand car, caused by a tool, the position of which on the car had been apparent to him, falling from it. *McEwen v. Central of Ga. Ry. Co.* (Ga.), 429.

Unblocked frogs causing injury to brakeman. *Choctaw, O. & G. R. Co. v. Thompson* (Ark.), 417.

Where employee would not have been injured by defect in turntable but for unknown defect in engine. *Barschow v. Lake Shore & M. S. Ry. Co.* (Mich.), 430.

Where servant refused to use the tools furnished by his employer and chose to use those of his own selection, his master was not liable for injuries sustained by the chipping thereof. *Denver & R. G. R. Co. v. Sporleder* (Colo.), 404.

**Burden of Proof.**

Burden imposed upon injured servant to show master's liability. *Creola Lumber Co. v. Mills* (Ala.), 395.

Burden of proof imposed upon brakeman injured by alleged obstruction near track. *Nashville, etc., Ry. v. Hays* (Tenn.), 387.

Concurrent negligence with respect to appliance and negligence of another employee rendered railroad liable for injury to its employee. *Britt v. Carolina N. R. Co.* (N. Car.), 453.

**Contributory Negligence.**

As affected by absence of automatic couplers in violation of federal act of March 2, 1893, § 2. *Schlemmer v. Buffalo, etc., R. Co.* (U. S.), 190.

Brakeman attempting to get upon moving locomotive, sufficiency of plea. *Creola Lumber Co. v. Mills* (Ala.), 395.

Brakeman's injury resulted from his failure to lookout for obstruction near track. *Nashville, etc., Ry. v. Hayes* (Tenn.), 387.

Brakeman's was question for jury. *Allen v. Atlantic Coast Line R. Co.* (N. Car.), 576.

Brakemen dismounting from moving trains. *Creola Lumber Co. v. Mills* (Ala.), 395.

Burden of proof on master of proving contributory negligence on part of his injured servant. *Hardt v. Chicago, etc., Ry. Co.* (Wis.), 468.

Burden upon railroad employee to show that his ignorance of dangerous conditions or defects in his company's yards was not only actual, but excusable. *Williams v. Choctaw, etc., R. Co.* (C. C. A.), 479.

Coupling with hand when acting in emergency. *Choctaw & O. & G. R. Co. v. Thompson* (Ark.), 417.

Defense of was not available where employee's injury was result of failure to equip cars with automatic couplers, unless employee's conduct amounted to recklessness. *Hairston v. United States Leather Co.* (N. Car.), 595.

Duty of employee, working constantly with engines in railroad yards, to observe dangerous conditions or defects therein. *Williams v. Choctaw, etc., R. Co.* (C. C. A.), 479.

Duty of servant to disobey order to do hazardous work. *Chicago, etc., Ry. Co. v. Rathneau* (Ill.), 202.

Evidence that employee was a prudent man. *St. Louis, etc., Ry. Co. v. Inman* (Ark.), 433.

**MASTER AND SERVANT—Continued.**

Fact that brakeman was injured because of way he selected for performing a duty, when, had he selected another way, injury would have been avoided, does not conclusively show contributory negligence. *Choctaw, O. & G. R. Co. v. Thompson* (Ark.), 417.

Failure of brakeman, injured by reason of a collision, to flag approaching train as required by rules, but when such act would have involved direct conflict with conductor's orders. *Crow v. Northern Pac. Ry. Co.* (Wash.), 199.

Instruction was erroneous, for if brakeman was guilty of negligence in any degree, which proximately contributed to his injury, he could not recover. *Nashville, etc., Ry. v. Hayes* (Tenn.), 387.

Insufficiency of evidence of where servant was injured while riding on defective hand car. *Boney v. Atlantic & N. C. R. Co.* (N. Car.), 609.

Members of hand car crew were not, as matter of law, guilty of in standing at front end of the car, as they had no reason to anticipate that its whole weight would be cast downward against them by the unusual conduct of their foreman when assisting them to remove car from track. *Hardt v. Chicago, etc., Ry. Co.* (Wis.), 468.

Riding on pilot of engine according to custom and by directions of superiors. *Barschow v. Lake Shore & M. S. Ry. Co.* (Mich.), 430.

Voluntarily and unnecessarily taking exposed position on train. *State v. Western Md. R. Co.* (Md.), 196.

Whether brakeman assumed the risk, or was guilty of contributory negligence, in attempting to make a coupling with defective apparatus, instead of crossing the track and using the lever on another car, was question of fact for jury. *Choctaw, O. & G. R. Co. v. Thompson* (Ark.), 417.

**Evidence.**

Condition of roadbed as to ballast a year and a half after derailment causing injury to plaintiff, defendant's conductor. *Dunbar v. Central Vt. R. Co.* (Vt.), 413.

Defective condition of master's machinery immediately before and after accident to servant. *Union Pac. R. Co. v. Edmondson* (Neb.), 173.

Not error to allow witness to state that, during time he had worked for defendant employer, he had never before known of a stake in a flat car being high enough to strike a rail being loaded on the car. *Chicago, etc., Ry. Co. v. Rathneau* (Ill.), 202.

*Res gestæ*, declaration of engineer in charge of engine, defective condition of which is alleged to have caused death of employee, regarding such defective condition, was admissible as. *Union Pac. R. Co. v. Edmonson* (Neb.), 173.

Testimony of injured employee that act of foreman in lifting car from track was not in accordance with manner customarily adopted in similar situations was sufficient to support finding that foreman's act was negligent, as against objection that the testimony was contrary to physical facts. *Hardt v. Chicago, etc., Ry. Co.* (Wis.), 468.

"Flying switch," whether negligence to make. *Allen v. Atlantic Coast Line R. Co.* (N. Car.), 576.

If tool was properly loaded, and nevertheless fell from hand car, causing its derailment, the occurrence was a pure accident, which could not be the foundation of an action by an injured employee against his railroad company. *McEwen v. Central of Ga. Ry. Co.* (Ga.), 429.

**MASTER AND SERVANT—Continued.**

Inspection, liability of master for negligence with respect to. *Sage v. Baltimore & O. R. Co. (Pa.)*, 591.

Joint action against master and servant may be based upon act of servant for which master is liable. *Mayberry v. Northern Pac. Ry. Co. (Minn.)*, 15.

"Last clear chance," evidence did not warrant submission of issue. *Allen v. Atlantic Coast Line R. Co. (N. Car.)*, 576.

**Limiting Liability.**

Pass for transportation issued to employee, validity of stipulation that he assumes all risk of accident. *Dugan v. Blue Hill St. Ry. Co. (Mass.)*, 159.

Negligence of foreman, rendering railroad liable, in lifting hand car from rails in manner not in accordance with custom. *Hardt v. Chicago, etc., R. Co. (Wis.)*, 468.

Presumption of negligence against master is not created by mere fact that servant is injured while discharging his duties. *Curtin v. Boston Elev. Ry. Co. (Mass.)*, 171.

Proximate cause of injury to member of hand car crew was unusual method used by his foreman to assist in removing car from track rather than the slippery condition of the ground. *Hardt v. Chicago, etc., Ry. Co. (Wis.)*, 468.

**Rules.**

Are themselves the best evidence of their contents. *Barschow v. Lake Shore & M. S. Ry. Co. (Mich.)*, 430.

Negligence with respect to defendant's injured brakeman to fail to observe rule requiring engines to sound whistles at such points as that where collision in question occurred. *Crow v. Northern Pac. Ry. Co. (Wash.)*, 199.

**Safe Work Place.**

Degree of care due from master for the safety of employees engaged in removing a wreck and repairing bridge. *St. Louis, etc., Ry. Co. v. Inman (Ark.)*, 433.

Duty of master to furnish. *St. Louis, etc., Ry. Co. v. Inman (Ark.)*, 433.

Negligence where brakeman was injured by alleged obstruction near track, insufficiency of evidence of. *Nashville, etc., Ry. v. Hayes (Tenn.)*, 387.

Unblocked frogs, actionable negligence in maintaining was not shown by evidence as to custom of other companies, etc. *Wabash R. Co. v. Kithcart (C. C. A.)*, 167.

**Scope of Employment.**

Authority of railroad's general agent to give watchman authority to investigate any damages done to company's passenger cars. *Johnston v. Chicago, etc., Ry. Co. (Wis.)*, 162.

Authority of watchman to arrest plaintiff on charge of throwing sticks at train. *Johnston v. Chicago, etc., Ry. Co. (Wis.)*, 162.

Authority of watchman to look after safety of company's passenger cars. *Johnston v. Chicago, etc., Ry. Co. (Wis.)*, 162.

Intentional acts of servant, master only liable for when they are within the apparent scope of master's business. *Blomsness v. Puget Sound Elec. Ry. (Wash.)*, 640.

Where it was within scope of authority of street railway's inspector to converse with persons injured in street car accidents, the company was liable for his conduct in putting his hand upon injured woman. *South Covington, etc., Ry. Co. v. Cleveland (Ky.)*, 143.

**Warn and Instruct.**

Duty to warn track laborer of approach of train. *Preodnick v. Lehigh Valley R. Co. (N. J.)*, 426.

**MASTER AND SERVANT—Continued.**

Warning of approach of train and lookout upon train, duty with respect to owing from railroad to its flagman, while he was engaged in his duties connected with switch lamps at street crossing. *Conniff v. Louisville, etc., Ry. Co. (Ky.)*, 465.

Warning of danger, duty of master to give. *Denver & R. G. R. Co. v. Sporleder (Colo.)*, 404.

**Who Are Employees.**

Person paid part of the time by railroad's foreman personally and part of the time placed on the railroad's pay roll. *Illinois Cent. R. Co. v. Timmons (Ky.)*, 462.

Question for jury whether plaintiff was an employee of the railroad, or only of the lumber company. *Britt v. Carolina N. R. Co. (N. Car.)*, 453.

Temporary suspension of relation while railroad employee was engaged in his own private affairs. *Russell v. Oregon Short Line R. Co. (C. C. A.)*, 601.

Where railroad delegated its duties of loading a car to lumber company making a shipment, it is liable for any injury to its own employee caused by negligence of employees of lumber company in loading car. *Britt v. Carolina N. R. Co. (N. Car.)*, 453.

**MORTGAGES.**

See **INSOLVENCY**.

**NEGLIGENCE.**

See **ACCIDENTS ON TRACK; BAGGAGE; CARRIERS; CHILDREN; CROSSINGS; FELLOW SERVANTS; FENCES; LEASES AND RUNNING POWERS; LICENSEES; LOGGING RAILROADS; PERSONAL INJURIES; STATIONS AND DEPOTS; STOCK, INJURIES TO; TRESPASSERS.**

Car furnished by railroad to employer of another, liability for injury to such employee from defect in. *McCallion v. Missouri Pac. R. Co. (Kan.)*, 178.

Contribution, rule that right of does not exist as between joint tort-feasors has no application to torts which are the result of mere negligence. *Mayberry v. Northern Pac. Ry. Co. (Minn.)*, 15.

Direction of verdict, when warranted. *Russell v. Oregon Short Line R. Co. (C. C. A.)*, 601.

Instruction omitting issue. *McGovern v. Interurban Ry. Co. (Iowa)*, 242.

Joinder of causes of action. *Mayberry v. Northern Pac. Ry. Co. (Minn.)*, 15.

Joint tort alleged as cause of death in a collision between trains, claimed to have resulted from negligence of railroad and its train dispatcher and certain telegraph operators and station agents. *Hough v. Southern Ry. Co. (N. Car.)*, 759.

Necessity of proof not only of the alleged negligence, but that it brought about the injury. *Payne v. Illinois Cent. R. Co. (C. C. A.)*, 635.

**Pleading.**

Allegations of, sufficiency of. *Creola Lumber Co. v. Mills (Ala.)*, 395.

Necessity of pleading legal duty owed by defendant, etc. *Chicago, etc., Ry. Co. v. McCandish (Ind.)*, 502.

Repairs made after accident do not give rise to presumption of negligence. *Matteson v. New York Cent., etc., Co. (Pa.)*, 751.

Willfulness, instructions as to definition of. *Hull v. Seaboard Air Line Ry. (S. Car.)*, 281.

**ORDINANCES.**

See RAILROADS IN STREETS; STREET RAILWAYS.

**PARENT AND CHILD.**

See CHILDREN.

**PARTIES.**

See BAGGAGE.

**PENAL STATUTES.**

See CONSTITUTIONAL LAW; EMPLOYERS' LIABILITY ACTS; INTERSTATE COMMERCE; RAILROADS IN STREETS; STATIONS AND DEPOTS.

**PERSONAL INJURIES.****Damages.**

Amount of is a question for jury. *Boney v. Atlantic & N. C. R. Co. (N. Car.)*, 609.

Earning capacity, evidence of. *Southern Ry. Co. v. Stockdon (Va.)*, 63.

Married woman's loss of earning capacity, instruction that she could not recover for was properly refused, as there was no evidence on the subject. *McGovern v. Interurban Ry. Co. (Iowa)*, 242.

Married woman's right to recover in her own right for her physical pain and mental anguish resulting from negligence. *McGovern v. Interurban Ry. Co. (Iowa)*, 242.

Medical attention where there is no evidence as to its value. *Niemyer v. Washington Water Power Co. (Wash.)*, 496.

Notice of claim for damages required by Wis. Rev. St. 1891, § 4222, sufficiency of. *Hardt v. Chicago, etc., Ry. Co. (Wis.)*, 468.

When supreme court will not disturb verdict as excessive. *Southern Ry. Co. v. Smith (Va.)*, 579.

Where jury properly found verdict for \$3,000, an instruction on measure of damages, stating that plaintiff in no event could recover more than \$15,000, the amount claimed in petition, was harmless. *McGovern v. Interurban Ry. Co. (Iowa)*, 242.

\$15,000 for injury to yard foreman, when verdict for will not be disturbed as excessive. *Southern Ry. Co. v. Smith (Va.)*, 579.

\$22,000 was not excessive for certain injuries sustained by a carpenter. *Louisville & N. R. Co. v. Melton (Ky.)*, 585.

**PESTHOUSES.**

See CARRIERS OF PASSENGERS.

**PLEADING.**

See CARRIERS.

**PRESUMPTIONS.**

See CARRIERS; CONNECTING CARRIERS; FIRES SET BY LOCOMOTIVES; NEGLIGENCE.

**PRIVATE CROSSINGS.**

It would not be presumed that expense to railroad, when seeking to change private crossing or establishing new crossing, would be excessive; and railroad would be enjoined from closing existing crossing until it had demanded that landowner select a new crossing. *Hartshorn v. Chicago G. W. Ry. Co. (Iowa)*, 565.

Railroad agreeing to give owners of farm an open crossing must



**PRIVATE CROSSINGS—Continued.**

comply with agreement, unless compliance will unnecessarily interfere with safe operation of the railroad or with public necessities of rapid transportation. *Hartshorn v. Chicago Great W. Ry. Co.* (Iowa), 565.

Right of railroad to make changes in private crossing. *Hartshorn v. Chicago G. W. Ry. Co.* (Iowa), 565.

**RAILROADS.**

See **STREET RAILWAYS.**

**Evidence.**

Railroad's books as evidence of subscriptions to its stock. *State v. Superior Court* (Wash.), 353.

**RAILROADS IN STREETS.**

See **CROSSINGS.**

**RES GESTÆ.**

See **EVIDENCE.**

**RIGHT OF WAY.**

See **EMINENT DOMAIN.**

Allegation of ownership of pathway over railroad track is not mere conclusion of law. *Louisville & N. R. Co. v. Scomp* (Ky.), 381.

**Damages.**

Measure of damages for obstruction of private passway over railroad's track. *Louisville & N. R. Co. v. Scomp* (Ky.), 381.  
Railroad's liability for obstruction of private passway over its track. *Louisville & N. R. Co. v. Scomp* (Ky.), 381.

**SLEEPING CAR COMPANIES.**

Sleeping car company was not liable to passenger for breach of contract because her car was diverted by the railroad company on account of a wreck and did not reach her destination, in consequence of which she was compelled to change into a day car. *Louisville & N. R. Co. v. Fisher* (C. C. A.), 684.

**STATIONS AND DEPOTS.**

See **CARRIERS OF PASSENGERS; RAILROAD AID.**

Warm waiting room, evidence, in action to recover on account of a cold, sustained verdict of negligence in failing to maintain. *Cincinnati, etc., Ry. Co. v. Mounts* (Ky.), 716.

Warm waiting room, liability, under Ky. St. 1903, § 784, because of failure to maintain. *Cincinnati, etc., Ry. Co. v. Mounts* (Ky.), 716.

**STOCK, INJURIES TO.**

See **FENCES.**

Cow being driven over private crossing allowed to wander on railroad's right of way, railroad not liable on account of running it down, unless it failed to use ordinary care to avoid the accident after discovering the animal on track. *Hansberry v. Chicago, etc., Ry. Co.* (Neb.), 731.

**Evidence.**

Condition of engine headlight at point four or five miles distant from place where plaintiff's horse was killed. *Central of Georgia Ry. Co. v. Hughes* (Ga.), 62.

**Fences.**

Allegation of failure to fence defendant's track was not supported by proof that gate was negligently left open. *High v. Southern Pac. Co.* (Ore.), 48.

**STOCK, INJURIES TO—Continued.**

Negligence must have been cause of death of plaintiff's horse, killed by running of defendant's train, to render latter liable. *Central of Georgia Ry. Co. v. Hughes* (Ga.), 62.

Question for jury whether point where animals strayed on right of way was within defendant's depot grounds, where it was not required to fence track. *High v. Southern Pac. Co.* (Ore.), 48.

**STREET RAILWAYS.**

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CROSSINGS; EVIDENCE.

**Damages.**

Constitutionality of statute authorizing town to permit street railway, in construction of its track, to change grade of street without making compensation to abutting owners injured thereby. *Hyde v. Boston & W. St. Ry. Co.* (Mass.), 489.

Street railway, changing grade of highway for construction of its road in accordance with permit granted by officers of municipality, is not liable for damages to abutting owner. *Hyde v. Boston & W. St. Ry. Co.* (Mass.), 489.

Fenders, non-compliance with ordinance requiring as negligence. *Ashley v. Kanawha Valley Traction Co.* (W. Va.), 520.

Ordinance requiring street cars to be stopped at three designated points for the reception of passengers, injunction will not be granted to restrain its enforcement. *Georgia Ry. & Electric Co. v. Town of Oakland City* (Ga.), 568.

Ordinance requiring street railway companies to file application for permit before entering upon and obstructing streets, etc., is not invalid as interfering with or violating franchise rights of the companies in streets. *State v. Frost* (Neb.), 356.

Presumption that, under ordinance requiring street railways to apply for permits before entering upon and obstructing streets, the city authorities will not abuse their discretion. *State v. Frost* (Wash.), 356.

**TAXATION.**

Local assessments, whether railroad's right of way was subject to. *Heman Construction Co. v. Wabash R. Co.* (Mo.), 555.

Railroad property, what constitutes. *City of Detroit v. Detroit Manufacturers' R. R.* (Mich.), 551.

**TICKETS AND FARES.**

See CARRIERS OF PASSENGERS.

Each coupon of railroad ticket to be regarded as a distinct ticket for each road, sold by first company for the other companies. *McCollum v. Southern Pac. Co.* (Utah), 265.

**Evidence.**

Oral evidence to show class of plaintiff's ticket was admissible in his favor. *McCollum v. Southern Pac. Co.* (Utah), 265.

Statute providing there can be no evidence of contents of writing, other than the writing itself, etc., was applicable to railway tickets. *McCollum v. Southern Pac. Co.* (Utah), 265.

**Excursion Tickets.**

Agreement between carriers and citizens of certain city with respect to the sale of excursion tickets did not contravene state or federal anti-trust laws. *Lytle v. Galveston, etc., Ry. Co.* (Tex.), 718.

**Limiting Liability.**

No presumption arises from purchase of railroad ticket that the ordinary duties of a carrier imposed by law are modified in the ticket. *McCollum v. Southern Pac. Co.* (Utah), 265.

**TICKETS AND FARES—Continued.**

- Pass issued to railroad's employee, validity of stipulation that he assumes all risk of accident. *Dugan v. Blue Hill St. Ry. Co.* (Mass.), 159.

Railroad tickets, whether contracts in writing. *McCollum v. Southern Pac. Co.* (Utah), 265.

Redemption of unused railroad tickets, it was no defense, under Iowa statute providing for, that person in charge of office of purchase directed plaintiff to apply for redemption at a freight depot, the location of which did not appear. *Shaw v. Chicago, etc., R. Co.* (Iowa), 617.

**Scapling Tickets.**

Injunction to prevent dealing in excursion tickets, right of carrier to. *Lytle v. Galveston, etc., Ry. Co.* (Tex.), 718.

**TORTS.**

See CARRIERS OF PASSENGERS; MASTER AND SERVANT; NEGLIGENCE.

**TRESPASSERS.**

See ACCIDENTS ON TRACK; ANIMALS; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS.

Care due from trainmen to trespassers on track. *Frye v. St. Louis, etc., Ry. Co.* (Mo.), 75.

Duty to person riding upon portion of freight train being switched in railroad yard, at invitation of brakeman. *Skirvin v. Louisville & N. R. Co.* (Ky.), 157.

Duty to trespasser on railroad track. *Chesapeake & O. Ry. Co. v. Nipp's Adm'r* (Ky.), 150.

Headlight of engine, fact that it was not burning was not negligence with respect to trespasser walking on track. *Frye v. St. Louis, etc., Ry. Co.* (Mo.), 75.

Liability for running train against trespasser depends upon whether railroad was chargeable with notice of his peril in time to avoid collision. *Hoback's Adm'r v. Louisville, etc., Ry. Co.* (Ky.), 8.

**Lookouts.**

Duty to lookout for trespassers on track at certain point at midnight as affected by fact that use of such point by pedestrians had been largely confined to Sundays and to reasonable hours in daytime. *Hoback's Adm'r v. Louisville, etc., Ry. Co.* (Ky.), 8.

Railroad not required to keep lookout for trespassers on its track. *Cook v. Southern Ry. Co.* (S. Car.), 730.

No duty owing to trespasser on railroad's switch until after his peril is discovered. *Elliott v. Louisville & N. R. Co.* (Ky.), 20.

Person riding upon portion of freight train being switched in railroad yard, at invitation of brakeman, his brother, was a trespasser, and could not recover for his injury, caused by sudden movement of cars. *Skirvin v. Louisville & N. R. Co.* (Ky.), 157.

**WAREHOUSEMEN.**

Carrier's liability as warehouseman. *Hardie & Co. v. Vicksburg, S. & P. Ry. Co.* (La.), 223.

**WATER AND WATERCOURSES.**

Railroad's right to throw barriers against flowage of surface water onto or across its right of way. *New Jersey, etc., R. Co. v. Tutt* (Ind.), 367.

**WITNESSES.**

Competency as witness of juror in previous case against defendant railroad. *Hull v. Seaboard Air Line Ry.* (S. Car.), 281.











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